

# Protecting Their Own?: Pro-American Bias and the Issuance of Anti-Suit Injunctions

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*"The United States cannot today impose its economic will on the rest of the world and expect meek compliance, if indeed it ever could."*<sup>1</sup>

*"L'antisuit injunction est une bombe nucléaire."*<sup>2</sup>

## INTRODUCTION

This year, Apple hopes to establish an iTunes movie rental service in international markets.<sup>3</sup> A "legal and regulatory minefield" awaits Apple as it attempts to take its digital download business into the European Union.<sup>4</sup> To succeed, Apple must navigate through copyright challenges, regulatory hurdles, and the licensing laws of the European Union's twenty-seven member states.<sup>5</sup>

What happens if Apple becomes entangled in an international dispute?<sup>6</sup> Suppose that Apple forms an agreement with Lovefilm, a British digital download service.<sup>7</sup> A year or so into the deal, the companies reach a point of contention. Lovefilm files an action in the English High Court, asking the court to enjoin Apple from commencing litigation in the United States. Shortly thereafter, Apple files a similar action in a U.S. district court,

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<sup>1</sup> Brief for the Republic of Indonesia as Amicus Curiae Supporting Petitioner at 17, PT Pertamina (Persero) v. Karaha Bodas Co., 128 S. Ct. 2958 (2008) (No. 07-619) (quoting *Gau Shan Co. v. Bankers Trust Co.*, 956 F.2d 1349, 1354 (6th Cir. 1992)).

<sup>2</sup> ["The anti-suit injunction is a nuclear bomb."] RENAUD CARRIER, *L'antisuit injunction* [The Anti-Suit Injunction], CENTRE DE DROIT MARITIME ET DES TRANSPORTS [Centre of Maritime and Transportation Law] 5 (2001) (Fr.), available at <http://junon.u-3mrs.fr/ad210w00/memoires/2001/m01care.html> (last visited Sept. 7, 2008).

<sup>3</sup> Eric Pfanner, *In Europe, Apple Faces Hurdles to iTunes Movie Rentals*, N.Y. TIMES, Jan. 21, 2008, at C6.

<sup>4</sup> *Id.*

<sup>5</sup> The member states remain largely independent in their approach to media distribution laws. *Id.*

<sup>6</sup> Digital media in Europe is a high-stakes market. The European Commission predicts that, by 2010, the online sale of films, music, and video games will generate revenue topping 8.3 billion euros (approximately 12.2 billion dollars). See Pfanner, *supra* note 3. The largely uncharted legal waters coupled with the potential for tremendous economic gain make litigation virtually inevitable.

<sup>7</sup> Pfanner, *supra* note 3.

attempting to bar Lovefilm from pursuing litigation in Britain. The courts of both nations grant the “anti-suit injunctions,” effectively forbidding each other’s courts from handling the parties’ dispute. The companies are suddenly locked in a cross-border dispute with no chance for resolution unless the court of one nation defies the ruling of the other. Recognizing the potential for a diplomatic crisis, both the President and the Prime Minister sweep in, trying to encourage resolution while also protecting the integrity of their nations’ courts. The House of Lords eventually yields, ending the stalemate by vacating the British injunction and effectively allowing a U.S. court to prevent a British company from seeking relief in its home court. Apple (and the United States) “wins”—but at what cost?<sup>8</sup>

Courts in many nations will, under certain circumstances, issue anti-suit injunctions to enjoin parties from proceeding with parallel litigation in the courts of another country.<sup>9</sup> No other equitable power that courts assert has “sparked as much interest and controversy as the international anti-suit injunction.”<sup>10</sup> When a U.S. federal court issues an anti-suit injunction, the action is particularly controversial because U.S. courts do not have a uniform

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<sup>8</sup> This hypothetical is intended to illustrate that international anti-suit injunctions can have far-reaching effects on the integrity of courts and diplomatic relations between countries. The scenario is loosely based on the diplomatic crisis that surrounded *Laker Airways Ltd. v. Sabena, Belgian World Airlines*, 731 F.2d 909 (D.C. Cir. 1984), which required the intervention of President Ronald Reagan and Prime Minister Margaret Thatcher. In *Laker*, a British court issued an anti-suit injunction barring an American airline company from pursuing litigation in the United States. A U.S. district court then issued a counter-anti-suit injunction, barring parties from enforcing the British anti-suit injunction. The House of Lords eventually lifted the British anti-suit injunction, ending the standstill and yielding to the U.S. proceedings, but not before the heads of state had entered into negotiations and President Reagan had ordered a Justice Department investigation of the proceedings. See George A. Bermann, *The Use of Anti-Suit Injunctions in International Litigation*, 28 COLUM. J. TRANSNAT’L L. 589, 591–93, 608 n.75 (1990).

<sup>9</sup> See Bermann, *supra* note 8, at 589. Scholars have traced anti-suit injunctions back to fifteenth-century England, where common law courts would issue writs of prohibition to check broad assertions of jurisdiction by ecclesiastical courts. David W. Raack, *A History of Injunctions in England Before 1700*, 61 IND. L.J. 539, 545–48 (1986). See also ANDREW BELL, FORUM SHOPPING AND VENUE IN TRANSNATIONAL LITIGATION 172 (2003).

<sup>10</sup> Bermann, *supra* note 8, at 589. Just this term, three petitions for certiorari in the U.S. Supreme Court have been filed over disputed anti-suit injunctions. See *Petition for a Writ of Certiorari, Goss Int’l Corp. v. Tokyo Kikai Seisakusho, Ltd.*, 128 S. Ct. 2957 (2008) (No. 07-618) (cert. denied); *Petition for Writ of Certiorari, PT Pertamina (Persero) v. Karaha Bodas Co.*, 128 S. Ct. 2958 (2008) (No. 07-619) (cert. denied); *Petition for a Writ of Certiorari, Canon Latin Am., Inc. v. Lantech (CR)*, 128 S. Ct. 2975 (2008) (No. 07-1421) (cert. denied).

method for evaluating anti-suit injunction motions.<sup>11</sup> There is a long-standing circuit split over which test to use when determining whether to issue an international anti-suit injunction.<sup>12</sup> Because of the circuit split, foreign companies that do business with U.S. companies have no way of predicting whether a U.S. court might one day bar them from litigating a dispute in their home country.<sup>13</sup> In already uncertain economic times, the unsettled anti-suit injunction doctrine injects an additional degree of unpredictability into international transactions.<sup>14</sup>

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<sup>11</sup> See Charles Kotuby, *November 2007 Round-Up: Focus on Anti-Suit Injunctions, The Hague Convention on the Civil Aspects of International Child Abduction, and Foreign Relations Implications of Private Lawsuits*, at <http://www.conflictoflaws.net/2007/cases/november-2007-round-up-focus-on-anti-suit-injunctions-the-hague-convention-on-the-civil-aspects-of-international-child-abduction-and-foreign-relations-implications-of-private-lawsuits/> (last visited Sept. 22, 2008) (reviewing recent anti-suit injunction cases and noting that the issue “has long-tortured consensus in federal courts”); Daniel Tan, *Anti-Suit Injunctions and the Vexing Problem of Comity*, 45 VA. J. INT’L L. 283, 289 (2005) (noting that the U.S. federal courts have not provided a “clear and workable test to guide the courts in the anti-suit injunction inquiry”) [hereinafter Tan, *Anti-Suit Injunctions*].

<sup>12</sup> Tan, *Anti-Suit Injunctions*, *supra* note 11, at 289. The Second, Third, Sixth, Eighth and D.C. Circuits have explicitly adopted the “restrictive” approach. *See, e.g.*, *China Trade & Dev. Corp. v. M.V. Choong Yong*, 837 F.2d 33, 36–37 (2d Cir. 1987); *Gen. Elec. Co. v. Deutz AG*, 270 F.3d 144, 161 (3d Cir. 2001); *Gau Shan Co. v. Bankers Trust Co.*, 956 F.2d 1349, 1354 (6th Cir. 1992); *Goss Int’l Corp. v. Man Roland Durckmaschinen Aktiengesellschaft*, 491 F.3d 355, 359–60 (8th Cir. 2007); *Laker Airways Ltd. v. Sabena, Belgian World Airlines*, 731 F.2d 909, 927–28 (D.C. Cir. 1984). The Fifth, Seventh, and Ninth Circuits have opted for the “liberal” approach. *See, e.g.*, *Kaepa, Inc. v. Achilles Corp.*, 76 F.3d 624, 627 (5th Cir. 1996); *Allendale Mut. Ins. Co. v. Bull Data Sys.*, 10 F.3d 425, 431 (7th Cir. 1993); *E. & J. Gallo Winery v. Andina Lacores S.A.*, 446 F.3d 984, 991 (9th Cir. 2006). The First Circuit has adopted a modified form of the restrictive approach. *See Quaak v. Klynveld Peat Marwick Goerdeler Bedrijfsrevisoren*, 361 F.3d 11, 17 (1st Cir. 2004). The Eleventh Circuit appears to be aligned with the restrictive approach. *Canon Latin Am., Inc. v. Lantech (CR), S.A.*, 508 F.3d 597, 601 (11th Cir. 2007). For detailed discussion of the approaches, see *infra* Parts III.B.1 and III.C.1.

<sup>13</sup> For an illustration of a foreign company’s frustration with the conflicting anti-suit injunction tests, see *Petition for Certiorari, PT Pertamina (Persero) v. Karaha Bodas Co.*, 128 S. Ct. 2958 (2008) (No. 07-619). The Indonesian company’s petition notes that “a foreign entity doing business in the United States, and subjecting itself to *in personam* jurisdiction, has little ability to predict whether it might be enjoined from litigation in its own country, or elsewhere, on the basis of a parallel U.S. suit.” *Id.* at 39.

<sup>14</sup> *See Gau Shan*, 956 F.2d at 1355 (“International commerce depends in no small part on the ability of merchants to predict the likely consequences of their conduct in overseas markets.”).

If the United States wants its businesses to thrive internationally, then the uncertainty surrounding anti-suit injunctions must be resolved.<sup>15</sup> Scholars have evaluated the merits of both sides of the circuit split,<sup>16</sup> but there has been very little empirical study of the actual circumstances under which courts are most likely to issue anti-suit injunctions.<sup>17</sup> This Note surveys anti-suit injunction cases across the circuits and attempts to determine what factors contribute to courts' decisions to grant anti-suit injunctions. The Note suggests that, in some circuits, the moving party's citizenship—although not an explicit factor in the courts' tests for anti-suit injunctions—may influence whether a court grants an anti-suit injunction.

Part I provides a general overview of anti-suit injunctions, touching on both their usefulness as well as their potentially detrimental effects. Part II explains the methodology used to survey anti-suit injunction cases. Part III presents the data from the case survey and suggests that one of the approaches, the "liberal test,"<sup>18</sup> is more favorable to American movants than

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<sup>15</sup> The *Karaha Bodas* Petition for Certiorari envisions the same type of scenario described *supra* note 8 and in the accompanying text. The *Karaha Bodas* petitioners suggest that the uncertainty surrounding anti-suit injunction doctrine "increases the likelihood that both the foreign court and the United States court will issue injunctions, such that an 'undesirable stalemate' in which both actions are paralyzed will occur. . . ." *Id.* at 39–40 (quoting *Gau Shan Co. v. Banker's Trust Co.*, 956 F.2d 1349 (6th Cir. 1992)).

<sup>16</sup> For a sampling of the different perspectives on the circuit split, see Thomas E. Burck, Note, *Gau Shan v. Bankers Trust Co.: What Should Be the Role of International Comity in the Issuance of Antisuit Injunctions?*, 18 N.C. J. INT'L L. & COM. REG. 475, 488–89 (1993) (recommending the restrictive approach in order to afford proper recognition to foreign jurisdictions and judgments); Edwin A. Perry, Comment, *Killing One Bird with One Stone: How the United States Federal Courts Should Issue Foreign Antisuit Injunctions in the Information Age*, 8 U. MIAMI BUS. L. REV. 123, 154–55 (1999) (recommending that federal courts adopt the liberal standard to accommodate the parties' equitable interests, especially for cases that arise out of internet transactions); Laura M. Salava, *Balancing Comity with Antisuit Injunctions: Considerations Beyond Jurisdiction*, 20 J. LEGIS. 267, 270 (1994) (recommending adopting the restrictive approach "in the interests of cooperation and reciprocity").

<sup>17</sup> Scholars have criticized the ambiguity that surrounds anti-suit injunction analysis. See, e.g., Daniel Tan, *Enforcing International Arbitration Agreements in Federal Courts: Rethinking the Court's Remedial Powers*, 47 VA. J. INT'L L. 545, 582 (2007) [hereinafter Tan, *Enforcing Arbitration*] ("[M]ore has to be done to elucidate the factors that go into the antisuit analysis and the weight that the courts place on them."). The one available empirical study was completed in 1999 and is in need of updating to reflect anti-suit injunction cases over the last eight years. See generally Margarita Treviño de Coale, *Stay, Dismiss, Enjoin, or Abstain?: A Survey of Foreign Parallel Litigation in the Federal Courts of the United States*, 17 B.U. INT'L L.J. 79 (1999) (conducting an extensive study of the cases that involved international parallel litigation from 1980 to 1999).

<sup>18</sup> See, e.g., *Kaepa, Inc. v. Achilles Corp.*, 76 F.3d 624, 627 (5th Cir. 1996).

to foreign movants, while the other approach, the “restrictive test,”<sup>19</sup> is more likely to result in nationality-neutral decisions. Part IV discusses why party nationality is an inappropriate factor for courts to use when deciding whether to grant an anti-suit injunction and proposes that the Supreme Court: (1) adopt the more diplomatic “restrictive” approach; (2) discourage lower courts from considering the moving party’s nationality; and (3) prompt courts to solicit the views of foreign jurisdictions before granting an anti-suit injunction.

## I. ANTI-SUIT INJUNCTIONS AND THE CIRCUIT SPLIT

The anti-suit injunction is a powerful tool for international litigants that want to halt multi-country parallel litigation.<sup>20</sup> This Part discusses the recent increase in international parallel litigation, the usefulness of anti-suit injunctions for avoiding problems that arise from duplicitous litigation in courts of different nations, and the threat that anti-suit injunctions pose to diplomatic relations.

As globalization continues to intertwine nations and their businesses, the amount of international litigation increases.<sup>21</sup> Within the last decade, there has been a “dramatic proliferation of cases involving foreign defendants” in the United States.<sup>22</sup> Because there are often several jurisdictions in which parties could litigate an international dispute, parallel litigation, the

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<sup>19</sup> See, e.g., *China Trade & Dev. Corp. v. M.V. Choong Yong*, 837 F.2d 33, 36–37 (2d Cir. 1987).

<sup>20</sup> Anti-suit injunctions are an integral part of the strategic arsenal of international litigants; the anti-suit injunction is often used in an effort to preempt the opposing party from filing an anti-suit injunction in a foreign court. See INTERNATIONAL LITIGATION: DEFENDING AND SUING FOREIGN PARTIES IN U.S. FEDERAL COURTS 163–64 (David J. Levy ed., 2003). This can lead to anti-anti-suit and even anti-anti-anti-suit injunctions in courts of multiple nations. *Id.* Levy likens international litigation to “three-dimensional chess compared to the ‘normal’ two-dimensional chess of domestic U.S. litigation.” *Id.* at xi.

<sup>21</sup> Louise Ellen Teitz, *Both Sides of the Coin: A Decade of Parallel Proceedings and Enforcement of Foreign Judgments in Transnational Litigation*, 10 ROGER WILLIAMS U. L. REV. 1, 2–3 (2004) [hereinafter Teitz, *Foreign Judgments*]. See also *Hearing Before the H. Comm. on Small Business*, 110th Cong. (2007) (statement of Richard Ginsburg, Acting Deputy Director for the Office of International Trade) (“[I]nternational trade, exports plus imports, is now so important to the U.S. economy that it is equivalent to 28 percent of GDP, the highest level in modern history.”).

<sup>22</sup> Panel: *Challenging the Assumption of Equality: The Due Process Rights of Foreign Litigants in U.S. Courts*, 5 SANTA CLARA J. INT’L L. 410, 414 (comments of Austen Parrish, Associate Professor at Southwestern Law School).

simultaneous litigation of similar matters between like parties, is increasingly likely to occur.<sup>23</sup>

Courts in the United States have traditionally grappled with parallel litigation by beginning with a presumption that "parallel proceedings on the same in personam claim should ordinarily be allowed to proceed simultaneously, at least until a judgment is reached in one which can be pled as *res judicata* in the other."<sup>24</sup> Despite this frequently recited tenet, United States courts will, under certain circumstances, issue anti-suit injunctions to enjoin parties from proceeding with parallel litigation in the courts of another nation.<sup>25</sup>

United States courts reach beyond their borders to issue anti-suit injunctions for several reasons. Courts use anti-suit injunctions to protect the moving party from vexatious litigation or to enforce the parties' prior agreement not to sue.<sup>26</sup> Courts also issue anti-suit injunctions to protect either their own jurisdiction or a public policy that is important to the local forum.<sup>27</sup>

Despite the principled reasons for issuing anti-suit injunctions, granting an anti-suit injunction may lead to controversy on an international scale.<sup>28</sup> Because barring a proceeding in a foreign nation could potentially impede a foreign state's sovereignty, issuing courts must not only consider the facts and arguments of the anti-suit injunction motions before them, but also the diplomatic implications of tinkering with the authority of a foreign court.<sup>29</sup>

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<sup>23</sup> Teitz, *Foreign Judgments*, *supra* note 21, at 9 (discussing the various circumstances under which parallel litigation may occur).

<sup>24</sup> *Laker Airways Ltd. v. Sabena, Belgian World Airlines*, 731 F.2d 909, 926–27 (D.C. Cir. 1984); N. Jansen Calamita, *Rethinking Comity: Towards a Coherent Treatment of International Parallel Proceedings*, 27 U. PA. J. INT'L ECON. L. 601, 668 n.209 (2006) (quoting *Laker Airways Ltd. v. Sabena, Belgian World Airlines*, 731 F.2d 909, 926–27 (D.C. Cir. 1984)).

<sup>25</sup> See Bermann, *supra* note 8, at 589. See also, e.g., *Seattle Totems Hockey Club, Inc. v. Nat'l Hockey League*, 652 F.2d 852, 855 (9th Cir. 1981) ("A federal district court with jurisdiction over the parties has the power to enjoin them from proceeding with an action in the courts of a foreign country, although the power should be 'used sparingly.'" (quoting *Philip v. Macri*, 261 F.2d 945, 947 (9th Cir. 1958))).

<sup>26</sup> Bermann, *supra* note 8, at 606 n.67.

<sup>27</sup> *Id.* Anti-suit injunctions are also employed by U.S. state courts against other states. *Id.* at 606–07. Bermann argues that, even though the international anti-suit injunctions pose more problems than "sister-state" anti-suit injunctions, the above-detailed justifications for issuing an anti-suit injunction are much more important at the international level than at the "sister-state" level. See *id.*

<sup>28</sup> See Bermann *supra* note 8, at 589, 591–93 & n.75.

<sup>29</sup> See, e.g., *E. & J. Gallo Winery*, 446 F.3d 984, 995 (9th Cir. 2006) (discussing the appropriate degree of deference to afford a foreign court when deciding whether to issue an anti-suit injunction); *Laker Airways*, 731 F.2d at 927 (noting that because the foreign

When some courts grant an anti-suit injunction, they temper the decision by stating that the injunction controls the conduct of private parties but does not usurp the power of foreign courts.<sup>30</sup> These statements, however, are essentially platitudes; it is widely acknowledged that issuing an anti-suit injunction interferes with a foreign court's jurisdiction.<sup>31</sup>

Concern over when it is permissible to impede a foreign court's jurisdiction through an anti-suit injunction is the fuel propelling the circuit split. International comity, which one circuit defined as "the degree of deference that a domestic forum must pay to the act of a foreign government not otherwise binding on the forum,"<sup>32</sup> has a different level of prominence in the two major anti-suit injunction tests. In the restrictive approach of the Second, Third, Sixth, Eighth, and D.C. Circuits, international comity is a pivotal factor: courts may issue an anti-suit injunction only if the foreign litigation threatens the jurisdiction of the U.S. court and if granting an anti-suit injunction will not interfere with international comity.<sup>33</sup> International

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state forum has a "preexisting right . . . to regulate matters subject to its prescriptive jurisdiction . . . [anti-suit injunctions] are rarely issued").

<sup>30</sup> See Bermann, *supra* note 8, at 589. Even when attempting to be deferential, courts are sometimes openly skeptical about the competence of foreign courts. For example in *Allendale Mutual Insurance Co. v. Bull Data Systems, Inc.*, 10 F.3d 425, 433 (7th Cir. 1993), the Seventh Circuit granted an American insurance company's petition for an anti-suit injunction barring an American subsidiary of a French corporation from litigating the suit in France. The *Allendale* court noted that the French court could not afford the American plaintiff the same protections it would receive in U.S. courts: "We do not question the competence of [the French] court, only its capacity relative to a U.S. district court to resolve this particular dispute *given the unusual turn that the litigation has taken. . .*" *Id.* at 431-32 (original emphasis). Teitz calls the Seventh Circuit's position regarding the "insufficient experience" of the French court a "rather chauvinistic view of international transactions." Teitz, *Foreign Judgments*, *supra* note 21, at 24.

<sup>31</sup> See *E. & J. Gallo*, 446 F.3d at 989 ("The injunction operates in personam: the American court enjoins the claimant, not the foreign court."). *But see* Bermann, *supra* note 8, at 589 (noting that addressing the injunction to private persons rather than to the foreign courts has done little to placate the anti-suit injunction controversy).

<sup>32</sup> *Laker Airways*, 731 F.2d at 937. International comity remains a nebulous concept. One author has suggested that "the only practical meaning of 'international comity' in the current case law is its role as a signal to litigants that the court will engage in some sort of ad hoc balancing in reaching its decision." Calamita, *supra* note 24, at 614. For more on the concept of international comity, see Louise Ellen Teitz, *Parallel Proceedings: Treading Carefully*, 33 INT'L LAW. 403 (1999) [hereinafter *Treading Carefully*] and Tan, *Anti-Suit Injunctions*, *supra* note 11.

<sup>33</sup> See, e.g., *China Trade & Dev. Corp. v. M.V. Choong Yong*, 837 F.2d 33, 36-37 (2d Cir. 1987). There may be some correlation between the restrictive circuits' test and the structure of the Anti-Injunction Act, 28 U.S.C. § 2283 (2000). Eric Roberson, Comment, *Comity Be Damned: The Use of Antisuit Injunctions Against the Courts of a Foreign Nation*, 147 U. PA. L. REV. 409, 428-30 (1998). The Anti-Injunction Act, one of

comity has a diminished role in the liberal approach of the Fifth, Seventh, and Ninth Circuits, which allows courts to grant an international anti-suit injunction after considering a number of equitable factors.<sup>34</sup> These factors include whether continuing foreign parallel litigation would be vexatious or oppressive to the moving party, frustrate a policy of the issuing forum, threaten the issuing court's jurisdiction, or prejudice other equitable considerations.<sup>35</sup>

The circuit split has grown more divisive within the past few years, with an increasing number of circuits declaring their preferred approach. The Eighth Circuit, which scholars once thought was in the liberal camp,<sup>36</sup> recently adopted the restrictive approach.<sup>37</sup> A district court in the Eleventh Circuit recently sided with the liberal circuits,<sup>38</sup> only to be reversed by a court of appeals decision that did not reach the issue of which approach to take.<sup>39</sup> The current approach of the Eleventh Circuit may now be more in line with the restrictive approach.<sup>40</sup> The First Circuit has also weighed in on the split, adopting the restrictive approach with some reservations.<sup>41</sup>

Although the restrictive test appears to express more concern for international comity than the liberal test, there has been doubt as to whether

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the United States' oldest statutes, prohibits federal courts from granting an injunction to stay proceedings of a state court "except as expressly authorized by Act of Congress, or where necessary in aid of its jurisdiction, or to protect or effectuate its judgments." 28 U.S.C. § 2283 (1948); *see also* *Atl. Coast Line R.R. Co. v. Bhd. of Locomotive Eng'rs*, 398 U.S. 281, 282 (1970) (noting that Congress passed the Anti-Injunction Act in 1793). Because the restrictive test limits anti-suit injunctions to situations in which the U.S. court's jurisdiction is threatened, the restrictive test somewhat tracks the language of the Anti-Injunction Act. Congress has not yet acted on the issue of international anti-suit injunctions; it is generally accepted that the decision to issue an international anti-suit injunction is "squarely within the discretion of the district courts." *Seattle Totems Hockey Club, Inc. v. Nat'l Hockey League*, 652 F.2d 852, 855 n.5.

<sup>34</sup> *See Seattle Totems*, 652 F.2d at 855; discussion at *supra* note 12.

<sup>35</sup> *Id.*

<sup>36</sup> *See* Steven R. Swanson, *The Vexatiousness of a Vexation Rule: International Comity and Antisuit Injunctions*, 30 GEO. WASH. J. INT'L L. & ECON. 1, 30–31 (1996).

<sup>37</sup> *See Goss Int'l Corp. v. Man Roland Druckmaschinen Aktiengesellschaft*, 491 F.3d 355, 360–361 (8th Cir. 2007).

<sup>38</sup> *Canon Latin Am., Inc. v. Lantech (CR), S.A.*, 497 F. Supp. 2d 1370 (S.D. Fla. 2007).

<sup>39</sup> *Canon Latin Am., Inc. v. Lantech (CR), S.A.*, 508 F.3d 597 (11th Cir. 2007).

<sup>40</sup> *See infra* Part III.B.4.

<sup>41</sup> *Quaak v. Klynveld Peat Marwick Goerdeler Bedrijfsrevisoren*, 361 F.3d 11, 17 (1st Cir. 2004). For a discussion of the modified-restrictive approach of the First Circuit, *see* Teitz, *Foreign Judgments*, *supra* note 21, at 28–30 and Tan, *Anti-Suit Injunctions*, *supra* note 11, at 291–94. For details on the *Quaak* case, *see infra* Part III.B.5.



there is a measurable difference between the two approaches.<sup>42</sup> At least one court has speculated that “the differences between the two standards may be semantic and not substantive.”<sup>43</sup> As Part III will demonstrate, there is a substantive difference between the two tests: applying the liberal test yields results much more likely to favor U.S. movants, while applying the restrictive test leads to more nationality-neutral decisions. The next section will detail the methodology used to examine anti-suit injunction cases and to reach this conclusion.

## II. METHODOLOGY

Because of the increasing prevalence of anti-suit injunction cases and the widening circuit split, analyzing the factors that influence court decisions to grant anti-suit injunctions is important.<sup>44</sup> To date, only one empirical survey has been performed to determine what, if any, practical difference exists between restrictive circuits and liberal circuits in terms of how frequently they grant anti-suit injunctions.<sup>45</sup> In the 1999 empirical survey, Professor Treviño de Coale suggested that the nationality of the party petitioning for an anti-suit injunction might be an underlying factor that influences both liberal and restrictive courts when deciding whether to issue an anti-suit injunction.<sup>46</sup> The possible correlation between party nationality and the issuance of anti-suit injunctions has not been thoroughly analyzed, however.<sup>47</sup>

This Note picks up where Professor Treviño de Coale’s empirical survey ended. Searches were performed both in LexisNexis and Westlaw for anti-suit injunction cases throughout the federal courts, beginning with the year

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<sup>42</sup> *Affymax, Inc. v. Johnson & Johnson*, 420 F. Supp. 2d 876, 883 (N.D. Ill. 2006).

<sup>43</sup> *Id.* at 883 (citing *Phillips Med. Sys. Int’l. B.V. v. Bruetman*, 8 F.3d 600, 605 (7th Cir. 1993)). For commentary on the *Affymax* decision, see Tan, *Enforcing Arbitration*, *supra* note 17, at 577–82 (criticizing the court for conducting a superficial anti-suit injunction analysis that did not provide guidelines for future litigants).

<sup>44</sup> See Tan, *Enforcing Arbitration*, *supra* note 17, at 577.

<sup>45</sup> See Treviño de Coale, *supra* note 17.

<sup>46</sup> *Id.* at 112–13. Professor Treviño de Coale observes that liberal circuits were more likely to grant anti-suit injunctions than restrictive circuits, but notices that liberal circuits also had more American movants than restrictive circuits. She speculates that the greater number of American movants in liberal circuits may “explain some of the discrepancies among circuits about the continuation of parallel litigation” and wonders if the data “suggest[s] that the citizenship of the plaintiff could influence the application of a court’s test for the grant of an antisuit injunction.” *Id.*

<sup>47</sup> *Id.* (noting that the relationship between party nationality and the issuance of an anti-suit injunction would be a good topic for further study).

1999.<sup>48</sup> To ensure that the searches would yield the necessary caselaw, the search terms “antisuit” and “anti-suit” were used.<sup>49</sup> As the cases were reviewed, any caselaw that the opinions cited was cross-checked with the results list, ensuring that there were not anti-suit injunction cases that the search missed simply because the court did not use the chosen search terms. At the end of the review process, only one case was found that did not turn up in the original LexisNexis and Westlaw searches. This provides reasonable assurance that the survey caught the vast majority of anti-suit injunction cases.

In the next sections, the results of the survey are detailed by circuit. Undoubtedly, there are a number of factors that can influence whether courts grant an anti-suit injunction.<sup>50</sup> This Note does not claim that party nationality

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<sup>48</sup> The search was confined to opinions dated between January 1, 1999 and December 31, 2007. Anti-suit injunction cases arising in bankruptcy courts were excluded due to the different body of law used in those courts.

<sup>49</sup> Not every case that mentions anti-suit injunctions deals particularly with international anti-suit injunctions. As mentioned in note 27, *supra*, U.S. state courts may issue anti-suit injunctions against parties attempting to sue in other U.S. states. Anti-suit injunction issues also arise in class action litigation. See Joan Steinman, *Managing Punitive Damages: A Role for Mandatory “Limited Generosity” Classes and Anti-Suit Injunctions?*, 36 WAKE FOREST L. REV. 1043, 1045–46 (2001). Therefore, not every case that resulted from the computer database searches was relevant to this Note. Even when a case involves foreign litigation, anti-suit injunctions are sometimes mentioned in passing or are proposed as alternative arguments that the court does not ultimately use to dispose of the case. See, e.g., *Four Seasons Hotels and Resorts, B.V. v. Consorcio Barr S.A.*, 377 F.3d 1164, 1170 (11th Cir. 2004) (declining to decide whether to issue an anti-suit injunction because the argument for an anti-suit injunction was not raised in an earlier proceeding). Cases in which the court’s opinion did not result in the decision of whether to grant or deny an anti-suit injunction were also omitted from this survey.

<sup>50</sup> Several scholars have attempted to categorize the situations in which anti-suit injunction issues arise. Daniel Tan suggests the possibility of solving the circuit split by devising policy-based categories under which anti-suit injunctions may issue. Tan, *Anti-Suit Injunctions*, *supra* note 11, at 324. Tan notes that anti-suit injunctions are useful in aid of arbitration and forum selection agreements, in situations of cross-border insolvency, in patent and trademark litigation, and in cases where an injunction is necessary to protect the jurisdiction of the U.S. court. *Id.* at 327–41. George A. Bermann divides anti-suit injunction cases into three categories: “convenience-based” anti-suit injunctions (stemming from the same principles as forum non conveniens, lis pendens, and choice-of-law cases), “obligation-based” anti-suit injunctions (arising out of a commitment by a party not to sue), and “policy-based” anti-suit injunctions (requiring a determination of whether an anti-suit injunction would interfere with an important policy of the enjoining forum). Bermann, *supra* note 8, at 609–27. These categorizations provide a meaningful context in which to situate the often factually complex anti-suit injunction cases. Even though factual circumstances outside of party nationality have an effect on whether courts issue anti-suit injunctions, the purpose of this Note is to examine pro-American movant bias, irrespective of the conditions under which the anti-suit injunction

is the only factor, or even the most important factor, that leads courts to issue anti-suit injunctions. Courts issue anti-suit injunctions in a variety of settings, and the circumstances are highly fact-specific. The data suggest, however, that the moving party's nationality may affect courts' decisions about anti-suit injunctions, especially in circuits that use the liberal test.

### III. THE EFFECT OF PARTY NATIONALITY ON THE ISSUANCE OF ANTI-SUIT INJUNCTIONS

This section presents the data from the survey of anti-suit injunction cases and analyzes the effect of party nationality on the issuance of anti-suit injunctions. First, the section discusses anti-suit injunction cases from the liberal circuits. When liberal circuit cases are viewed in the aggregate, the data suggest that American movants may have an easier time obtaining an anti-suit injunction in a liberal circuit than foreign movants. Next, the section discusses anti-suit injunction cases arising in the restrictive circuits. The data from the restrictive circuits suggests that foreign and American movants are more likely to receive even-handed treatment in the restrictive circuits. Finally, the section considers the survey's limitations and the conclusions that may be drawn from the data.

#### A. *The Effect of Party Nationality in Liberal Circuits*

This part discusses the anti-suit injunction cases arising under the liberal approach. First, the liberal circuits' test for whether to issue an anti-suit injunction is described. Next, anti-suit injunction cases from the Fifth, Seventh, and Ninth Circuits are each considered in turn. Analysis of the cases across the liberal circuits reveals that the liberal test may yield results more likely to favor American movants.

##### 1. *The Liberal Approach*

The liberal circuit approach for issuing an anti-suit injunction considers several factors: whether continued parallel litigation would "(1) frustrate a policy of the forum issuing the injunction; (2) be vexatious or oppressive; (3) threaten the issuing court's . . . jurisdiction; or (4) where the proceedings

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motion arises. Throughout this analysis, a special note is made when there are extraordinary factual circumstances that may have trumped concerns over party nationality.

prejudice other equitable considerations.”<sup>51</sup> Unlike restrictive circuits, where concerns over international comity dominate the circuits’ approach, the liberal circuits’ anti-suit injunction opinions tend to focus on the strength of one or more of the aforementioned factors.<sup>52</sup> As the data will reveal, the liberal test’s focus on equitable factors appears to give American movants a greater opportunity for receiving an anti-suit injunction than foreign movants.

## 2. Fifth Circuit

The Fifth Circuit has decided seven anti-suit injunction cases since 1999.<sup>53</sup> Two cases were between two parties of foreign nationality.<sup>54</sup> One case was a dispute between a foreign employee and an American shipowner.<sup>55</sup> Four cases involved an American moving for an anti-suit injunction against a foreign party.<sup>56</sup>

Out of the four anti-suit injunction cases involving American movants, courts in the Fifth Circuit granted an anti-suit injunction against a foreign entity twice. In *Commercializadora Portimex, S.A. de C.V. v. Zen-Noh Grain*

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<sup>51</sup>*In re Unterweser Reederei, GmbH*, 428 F.2d 888, 890 (5th Cir. 1970) (citing 7 JAMES WM. MOORE, ET AL., MOORE’S FEDERAL PRACTICE § 65.19 (2d ed. 1953)), *rev’d on other grounds sub nom. M/S Bremen v. Zapata Off-Shore Co.*, 407 U.S. 1 (1972).

<sup>52</sup>*See E. & J. Gallo Winery v. Andina Licores S.A.*, 446 F.3d 984, 995 (9th Cir. 2006).

<sup>53</sup>*Karaha Bodas Co. v. Perusahaan Pertambangan Minyak Dan Gas Bumi Negara*, 335 F.3d 357, 360 (5th Cir. 2003) [hereinafter *Karaha Bodas Fifth Circuit*]; *Sector Navigation Co. v. M/V Captain P*, No. 06-1788, 2007 WL 854311 (E.D. La. Mar. 15, 2007); *Skidmore Energy Inc. v. KPMG*, No. Civ.A. 303CV2138B, 2004 WL 2804888 (N.D. Tex. Dec. 3, 2004); *Indus. Mar. Carriers (Bahamas), Inc. v. Barwil Agencies A.S.*, No. Civ.A. 03-1668, 2003 WL 22533704 (E.D. La., Nov. 5, 2003); *Commercializadora Portimex, S.A. de C.V. v. Zen-Noh Grain Corp.*, 373 F. Supp. 2d 645 (E.D. La. 2005); *Home Healthcare Affiliates of Mississippi, Inc. v. N. Am. Indemnity N.V.*, No. 1:01CV489-D-A, 2003 WL 22244382 (N.D. Miss. Aug. 7, 2003); *MacPhail v. Oceaneering Int’l.*, 302 F.3d 274 (5th Cir. 2002).

<sup>54</sup>*See Karaha Bodas Fifth Circuit*, 335 F.3d at 360 (a suit between an Indonesian company and a Cayman Islands company); *Sector Navigation*, 2007 WL 854311, at \*1 (suit between a foreign corporation that owned a tanker of Panamanian registry and a ship of Liberian registry).

<sup>55</sup>*MacPhail*, 302 F.3d at 276 (suit between American shipowner and Australian employee).

<sup>56</sup>*Skidmore Energy*, 2004 WL 2804888, at \*1 (suit between a U.S. company and a Moroccan company); *Indus. Mar.*, 2003 WL 22533704, at \*1 (suit between plaintiffs, a Bahamas corporation and an American corporation and defendants, one of which was a South Korean corporation); *Zen-Noh*, 373 F. Supp. 2d at 645 (suit between a Louisiana corporation and a Mexican importer); *Home Healthcare*, 2003 WL 22244382, at \*1 (suit between American corporations and a Belgian company).

*Corp.*,<sup>57</sup> the court granted a Louisiana corporation's petition for an anti-suit injunction against a Mexican corporation that barred further proceedings in a Mexican court.<sup>58</sup> The court noted that the Mexican proceeding was "vexatious and oppressive litigation that threatens the Court's jurisdiction."<sup>59</sup> When applying the liberal test's equitable factors to the facts of the case, the court drew attention to the fact that: "Zen-Noh is a Louisiana company and because it has already defended Portimex's breach of contract claims on the same transactions and prevailed . . . it would be an inequitable hardship to require Zen-Noh to devote the time and expense to defend itself against the same claims in Mexico."<sup>60</sup> The court also indicated that it had a strong interest "in prohibiting duplicative litigation and in protecting its jurisdiction and final judgments."<sup>61</sup> The Zen-Noh case, therefore, can be understood as a situation where the structure of the liberal test allowed the court to protect its jurisdiction by protecting an American corporation.

The liberal test also yielded a result favorable to American movants in *Home Healthcare Affiliates of Mississippi, Inc. v. North American Indemnity N.V.*<sup>62</sup> In *Home Healthcare*, the court granted the petition of two American corporations to prevent the defendants, one of whom was a Belgian company, from pursuing litigation in Belgium.<sup>63</sup> The court noted that "it would definitely be an inequitable hardship for the [p]laintiffs, who are Mississippi companies, to effectively represent their interests in Belgium."<sup>64</sup> International comity was not a substantial factor in the court's analysis, particularly because the lawsuit stemmed from relationships between private

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<sup>57</sup> 373 F. Supp. 2d 645 (E.D. La. 2005).

<sup>58</sup> *Id.* at 646. The Court had initially denied Zen-Noh's motion for an injunction because Portimex had threatened, but had not yet filed, a lawsuit in Mexico. *Id.* at 648. Portimex subsequently filed two lawsuits, one in Louisiana state court and one in a Mexican civil court. *Id.* Upon removal by Zen-Noh, the district court granted the anti-suit injunction in an opinion that condemned Portimex's efforts to pursue duplicative litigation in Louisiana and in Mexico. *Id.* Also significant in the court's decision was a choice-of-law clause in the contract between the parties: they had previously agreed to apply Louisiana law, so the court saw no reason to allow Portimex to proceed with its Mexican lawsuit. *Id.* at 650.

<sup>59</sup> *Zen-Noh*, 373 F. Supp. 2d at 649.

<sup>60</sup> *Id.*

<sup>61</sup> *Id.* at 652.

<sup>62</sup> No. 1:01CV489-D-A, 2003 WL 22244382 (N.D. Miss. Aug. 7, 2003).

<sup>63</sup> *Id.*

<sup>64</sup> *Id.* at \*3. The court also noted that the Belgian corporation entered into contracts with the plaintiffs in the United States, had significant business contacts in the United States, and had officers that traveled to the United States frequently. *Id.* By noting these contacts, the court was able to dismiss concerns with international comity and focus almost exclusively on whether the Belgian action would be vexatious or oppressive to the American movants. *Id.* at \*3-4.

parties, “most of which . . . are United States residents.”<sup>65</sup> Instead, the equitable factors in the liberal test compelled a favorable result for the American movant.

Although being an American movant in the Fifth Circuit seems to make receiving an anti-suit injunction more likely, courts in the Fifth Circuit have not granted anti-suit injunctions to all American movants. In *Skidmore Energy, Inc. v. KPMG*,<sup>66</sup> an American corporation moved for an anti-suit injunction against KPMG, a Moroccan corporation.<sup>67</sup> The court was powerless to issue an anti-suit injunction because it did not have personal jurisdiction over the Moroccan defendants.<sup>68</sup> In *Industrial Maritime Carriers v. Barwil Agencies*,<sup>69</sup> the court denied the American and Bahamian co-plaintiffs’ petition for an anti-suit injunction against a South Korean corporation.<sup>70</sup> The court’s reasoning seemed to stem primarily from the fact that the South Korean lawsuit had been filed before the parallel litigation in the United States and that judgment had already been reached on the dispute in Turkey.<sup>71</sup>

Although American movants received anti-suit injunctions against foreign parties in only two out of four cases, the data still suggests that the liberal test is more favorable to American movants than foreign movants. When foreign movants petition American courts for anti-suit injunctions, courts in the Fifth Circuit appear to be extremely reluctant to grant their motions.

In all three of the cases where foreign movants have petitioned the Fifth Circuit for an anti-suit injunction, the anti-suit injunction has been denied.<sup>72</sup> In *Karaha Bodas Co. v. Perusahaan Pertamina Minyak Dan Gas Bumi*

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<sup>65</sup> *Id.* at \*3.

<sup>66</sup> No. Civ.A. 303CV2138B, 2004 WL 2804888, at \*1 (N.D. Tex. Dec. 3, 2004).

<sup>67</sup> *Id.*

<sup>68</sup> *Id.* at \*5. Although the court was asked to issue an anti-suit injunction, the court did not go through anti-suit injunction analysis beyond simply stating the liberal test because of the lack of jurisdiction. *Id.* Even if the court had personal jurisdiction over the Moroccan defendants, it is doubtful that an anti-suit injunction would have been granted because “the focal point of the alleged wrongdoing occurred in Morocco, not Texas.” *Id.* at \*6. Given those facts, the “extraordinary remedy” of an anti-suit injunction likely would not have been granted. *Id.* at \*3.

<sup>69</sup> No. 03-1688, 2003 WL 22533704, at \*1 (E.D. La., Nov. 5, 2003).

<sup>70</sup> *Id.* at \*5.

<sup>71</sup> *Id.* at \*3 (noting that there is no precedent for granting an international anti-suit injunction when foreign action has been filed before the U.S. action and a judgment in that foreign action has already been reached).

<sup>72</sup> *Karaha Bodas Fifth Circuit*, 335 F.3d 357, 375 (5th Cir. 2003); *MacPhail v. Oceaneering Intern., Inc.*, 302 F.3d 274, 278 (5th Cir. 2002); *Sector Navigation Co. v. M/V Captain P*, No. 06-1788, 2007 WL 854311, at \*1 (E.D. La., Mar. 15, 2007).

*Negara*,<sup>73</sup> the Fifth Circuit denied a Cayman Islands corporation's motion for an anti-suit injunction against a state-operated Indonesian corporation.<sup>74</sup> The anti-suit injunction would have prohibited the Indonesian corporation from filing an action in Indonesia to annul a Swiss arbitration award.<sup>75</sup> Because the case arose under the laws of the New York Arbitration Convention, the Fifth Circuit court was operating only as a court of secondary jurisdiction.<sup>76</sup> The court declined to issue the anti-suit injunction, noting that none of the factors for an anti-suit injunction were present and that the "case implicates public international issues" that have "been litigated chiefly in non-American fora."<sup>77</sup> Perhaps recognizing the gravity of the diplomatic issues before it, the Fifth Circuit stated: "Upholding the district court's injunction could only further exacerbate the problem, diplomatically if not legally as well."<sup>78</sup>

A federal district court in Louisiana similarly deferred to foreign proceedings in matters between two foreign entities in *Sector Navigation Co. v. M/V Captain P*.<sup>79</sup> The *Sector Navigation* court denied a motion for an international anti-suit injunction filed by Sector, a foreign company, that would have barred another foreign company from limiting its liability through court proceedings in Nigeria.<sup>80</sup> In the court's decision, it noted that: "principles of comity require this Court to refrain from interfering with the pending proceedings in Nigeria."<sup>81</sup>

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<sup>73</sup> 335 F.3d 357.

<sup>74</sup> *Id.* at 375–376 (vacating a preliminary anti-suit injunction that the district court had granted).

<sup>75</sup> *Id.* at 368–69.

<sup>76</sup> *Id.* The court's role as a court of secondary jurisdiction seemed to be of particular importance in the court's decision to deny the anti-suit injunction. *Id.* at 368. The court did not find any reason why litigating a dispute in Indonesia would have been an inequitable hardship, especially since a related lawsuit had already been initiated there. *Id.* at 368–69. From this reasoning, one could conclude that the court denied an anti-suit injunction not out of bias against the foreign movant, but rather because it was simply more practical to keep U.S. involvement minimal. Nevertheless, this case demonstrates that foreign movants may have a more difficult time receiving an anti-suit injunction in liberal circuits than in restrictive circuits. This is particularly apparent by comparing this Fifth Circuit case with a nearly identical lawsuit that the same parties litigated in the restrictive Second Circuit. *See Karaha Bodas Co. v. Perusahaan Pertambangan Minyak Dan Gas Bumi Negara*, 500 F.3d 111, 113 (2d Cir. 2007) [hereinafter *Karaha Bodas Second Circuit*]. In that case, discussed in *infra* Part III.B.6.b, the Second Circuit *granted* the anti-suit injunction to the movants. *Id.* at 113. This reaffirms the idea that foreign movants may be on more equal footing with American movants in restrictive circuits.

<sup>77</sup> *Karaha Bodas Fifth Circuit*, 335 F.3d at 372.

<sup>78</sup> *Id.* at 373–74.

<sup>79</sup> No. 06-1788, 2007 WL 854311, at \*1 (E.D. La. Mar. 15, 2007).

<sup>80</sup> *Id.* at \*1.

<sup>81</sup> *Id.* at \*2.

When an American party wanted to continue the foreign litigation and a foreign party moved to enjoin the foreign proceedings, the Fifth Circuit refused to enjoin the international litigation.<sup>82</sup> In *MacPhail v. Oceaneering International, Inc.*, the court rejected the notion that allowing the American party to litigate its claim in an Australian court would harm the district court's jurisdiction.<sup>83</sup> The Fifth Circuit, despite having a liberal standard for issuing anti-suit injunctions, gives greater weight to principles of comity—and is thus more likely to deny an anti-suit injunction motion—when a foreign entity is seeking an anti-suit injunction. Comparing the foreign-movant cases to the American-movant cases suggests that the liberal test may be a more favorable standard for American movants than foreign movants.

### 3. Seventh Circuit

American movants were successful in both anti-suit injunction cases that arose in the Seventh Circuit between 1999 and 2008.<sup>84</sup> In *U.S. Commodity Futures Trading Commission v. Lake Shore Asset Management Ltd.*,<sup>85</sup> the Commodity Futures Trading Commission, an independent federal regulatory agency, petitioned the court to appoint a receiver over Lake Shore Asset Management.<sup>86</sup> Lake Shore, a hedge fund that purported to be a Bermuda corporation domiciled in the British Virgin Islands,<sup>87</sup> contested the appointment by contending that the action was an improper anti-suit injunction that “would prevent Lake Shore entities from pursuing [a] British action. . . .”<sup>88</sup> The court rejected the argument that appointment of a receiver was an anti-suit injunction, but noted that even if its action had the effect of an anti-suit injunction, it would not be improper under the liberal approach of the Seventh Circuit.<sup>89</sup> The court did not attribute its decision directly to the status of the plaintiff as a federal regulatory agency, but the court did note that appointing the receiver in this case protected its jurisdiction and

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<sup>82</sup> *MacPhail v. Oceaneering Intern., Inc.*, 302 F.3d 274, 278 (5th Cir. 2002).

<sup>83</sup> *Id.* at 277.

<sup>84</sup> *U.S. Commodity Futures Trading Comm'n. v. Lake Shore Asset Mgmt. Ltd.*, No. 07C 3598, 2007 WL 2915647, at \*1 (N.D. Ill. Oct. 4, 2007); *Affymax, Inc. v. Johnson & Johnson*, 420 F. Supp. 2d 876, 885 (N.D. Ill. 2006).

<sup>85</sup> 2007 WL 2915647.

<sup>86</sup> *Id.* at \*1.

<sup>87</sup> Complaint at ¶ 8, *U.S. Commodity Futures Trading Comm'n v. Lake Shore Asset Mgmt. Ltd.*, 2007 WL 1875120 (N.D. Ill. Oct. 4, 2007) (No. 07C 3598).

<sup>88</sup> *Lake Shore*, 2007 WL 2915647, at \*20.

<sup>89</sup> *Id.*



prevented the defendant from “frustrat[ing] this court’s ability to provide meaningful relief.”<sup>90</sup>

In *Affymax, Inc. v. Johnson & Johnson*,<sup>91</sup> the Seventh Circuit granted an anti-suit injunction to an American movant, Ortho-MacNeil Pharmaceutical, against Affymax, a Delaware corporation that was the successor of a Netherlands corporation.<sup>92</sup> The court concluded that “the case for an anti-suit injunction is most compelling when a party seeks to both enforce a judgment and avoid duplicate litigation” and noted that “[a]n injunction in this case would achieve both goals.”<sup>93</sup> Even though the court did not directly implicate the nationality of the moving party into its analysis, the court granted an anti-suit injunction to an American movant over protests about the U.S. court’s interference with international comity.<sup>94</sup>

Because the Seventh Circuit has not dealt with an anti-suit injunction petition by a foreign movant during the period of this survey, it is difficult to assess whether the circuit’s application of the liberal test results in decisions that favor American movants. However, given that the Seventh Circuit’s seminal case about anti-suit injunctions, *Allendale Mutual Insurance Co. v. Bull Data Systems*, was explicitly pro-American in its decision,<sup>95</sup> the possibility of a correlation between the movant’s nationality and whether an anti-suit injunction is granted seems strong in this circuit.

#### 4. Ninth Circuit

As with the other circuits that use the liberal test, courts in the Ninth Circuit grant anti-suit injunctions to American movants more often than foreign movants.<sup>96</sup> In *E. & J. Gallo Winery v. Andina Licores S.A.*,<sup>97</sup> the

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<sup>90</sup> *Id.* at \*21. The court found the parallel litigation efforts of Lake Shore’s attorneys particularly vexatious: the court ordered Lake Shore’s counsel to “show cause why this matter should not be referred to the United States Attorney for investigation and possible prosecution of criminal contempt. . . .” U.S. Commodity Futures Trading Comm’n v. Lake Shore Asset Mgmt Ltd., No. 07C 3598, 2007 WL 4591005, at \*1 (N.D. Ill., Dec. 21, 2007).

<sup>91</sup> 420 F. Supp. 2d 876 (N.D. Ill. 2006).

<sup>92</sup> *Id.* at 885. For the nationality of the parties see Complaint at ¶¶ 5–7, *Affymax, Inc. v. Johnson & Johnson*, 420 F. Supp. 2d 876, 878 (N.D. Ill. 2006) (No. 04 C 6216).

<sup>93</sup> *Affymax*, 420 F. Supp. 2d at 884.

<sup>94</sup> *Affymax*, the non-moving party, pointed to numerous reasons why the anti-suit injunction would cause irreparable harm. *Id.* at 885. The court dismissed those concerns, asserting that *Affymax*’s business relations had already been irreparably harmed and that an anti-suit injunction would cause no additional damage. *Id.*

<sup>95</sup> *Allendale v. Bull Data Systems, Inc.*, 10 F.3d, 425, 431–32 (7th Cir. 1993).

<sup>96</sup> The anti-suit injunction issue has arisen twice in the Ninth Circuit since 1999. See *E. & J. Gallo Winery v. Andina Licores S.A.*, 446 F.3d 984, 987 (noting that Gallo is a

Ninth Circuit issued an anti-suit injunction against Andina Licores, an Ecuadorian corporation, prohibiting Andina Licores from pursuing litigation of its claims against a California winery in Ecuador.<sup>98</sup> Central to the court's decision in this contract dispute was the court's perception of the proceedings in Ecuador as "messy, protracted, and potentially fraudulent. . . ."<sup>99</sup> Along with this reasoning, the Ninth Circuit also looked to the contract's California forum selection clause.<sup>100</sup> The Ninth Circuit allowed the anti-suit injunction to issue by pointing to the United States' "policy favoring the enforcement of forum selection clauses" as a policy that warranted an anti-suit injunction under the liberal approach's factors.<sup>101</sup> *E. & J. Gallo Winery*, therefore, is another case in which application of the liberal test results in the issuance of an anti-suit injunction to an American movant.<sup>102</sup>

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California winery and Andina Licores is an Ecuadorian distributor); *Microsoft Corp. v. Lindows.com, Inc.*, 319 F. Supp. 2d 1219, 1219 (W.D.Wash. 2004) (noting that the movant, Lindows.com is a Delaware corporation and Microsoft is a Washington corporation).

<sup>97</sup> 446 F.3d 984 (9th Cir. 2006).

<sup>98</sup> *Id.* at 995.

<sup>99</sup> *Id.*

<sup>100</sup> *Id.* at 993–94.

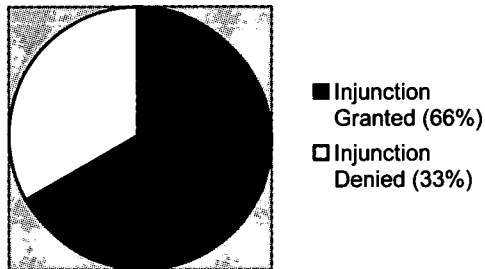
<sup>101</sup> *Id.* at 991–92, 994. One could argue that it was the forum selection clause, not party nationality that prompted the anti-suit injunction. The presence of a forum selection clause does seem to automatically swing the balance in favor of granting an anti-suit injunction. See also *Zen-Noh*, *supra* notes 59–62 and accompanying text. The court, however, seemed preoccupied with the potential inequities in the Ecuadorian court, indicating a lack of confidence in the foreign court's ability to adjudicate the dispute fairly. *E. & J. Gallo*, 446 F.3d at 995. This indicates that the court's decision was not based solely on the forum selection clause, but also based on concern for American movants that were being handed over to the mercy of a foreign judicial system that the American courts do not appear to completely trust.

<sup>102</sup> The only other Ninth Circuit anti-suit injunction case since 1999 involved an American plaintiff seeking an anti-suit injunction against another American corporation. In *Microsoft Corp. v. Lindows.com, Inc.*, the court declined to grant an anti-suit injunction that would bar trademark litigation. 319 F. Supp. 2d 1219, 1220 (W.D. Wash. 2004). Although the anti-suit injunction was denied, the court issued a cautionary warning to Microsoft, the party attempting to pursue foreign litigation. The court "caution[ed] the parties that engaging in litigation strategies that may be appropriate in other countries may not reflect well on counsel who must still practice before this Court." <sup>102</sup> *Id.* at 1223. Thus, even though the anti-suit injunction was denied, protecting American movants from vexatious litigation abroad—even against other American parties—was an expressed concern of the court.

### 5. Analysis of Liberal Circuit Anti-Suit Injunction Cases

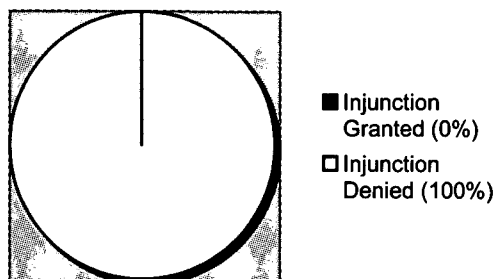
The aggregate data from liberal circuit cases suggests that American movants are significantly more likely to receive anti-suit injunctions than foreign movants. The number of anti-suit injunction cases involving foreign movants is very small in the liberal circuits, however, so the caselaw must develop further before definite conclusions can be reached. Based on the trends demonstrated by this sampling, the moving party's nationality may be an implicit factor in the liberal circuits' approach to anti-suit injunction analysis. As depicted in the charts below, American movants in liberal circuits have been granted anti-suit injunctions more often than they have been denied them, while foreign movants have not secured an anti-suit injunction during the years included in this survey.

American Movants in Liberal Circuits: <sup>103</sup>



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<sup>103</sup> *Skidmore Energy*, 2004 WL 2804888, at \*8 (case dismissed for lack of personal jurisdiction); *Indus. Mar.*, 2003 WL 22533704, at \*1 (injunction denied); *Zen-Noh*, 373 F. Supp. 2d at 646 (injunction granted); *Home Healthcare*, 2003 WL 22244382, at \*1 (injunction granted); *Lake Shore*, 2007 WL 2915647, at \*1 (injunction granted); *Affymax*, 420 F. Supp. 2d at 885 (injunction granted); *E. & J. Gallo*, 446 F.3d at 995 (injunction granted).

Foreign Movants in Liberal Circuits:<sup>104</sup>

The structure of the liberal circuit test may be what causes liberal circuits to grant anti-suit injunctions more freely to American movants than to foreign movants. By placing almost exclusive weight on equitable factors, the approach may allow any existing pro-American bias to implicitly affect the courts' analysis of whether to grant an anti-suit injunction. Because the liberal approach asks courts to weigh factors such as vexatiousness or oppressiveness,<sup>105</sup> American movants asking their home courts to bar foreign proceedings likely have an advantage over foreign movants that attempt to convince U.S. courts that foreign litigation is too vexatious.<sup>106</sup> Therefore, the liberal test's equity inquiry may be one of the reasons why American movants are more likely to receive anti-suit injunctions than foreign movants. As discussed in the next section, the restrictive test is much less likely to result in decisions that favor American movants.

### B. Party Nationality in Restrictive Circuits

This part discusses the restrictive circuits' anti-suit injunction cases. The section first details the restrictive test for determining anti-suit injunctions.

<sup>104</sup> See *Karaha Bodas Fifth Circuit*, 335 F.3d at 360 (injunction denied); *Sector Navigation*, 2007 WL 854311, at \*1 (injunction denied); *MacPhail*, 302 F.3d at 278 (injunction denied). Compare with *Karaha Bodas Second Circuit*, 500 F.3d at 113; see also *infra* Part III.B.7.

<sup>105</sup> See *E. & J. Gallo*, 446 F.3d at 993.

<sup>106</sup> In this way, the liberal circuit approach is similar to the doctrine of *forum non conveniens*, which permits favoring American plaintiffs. See *discussion infra* Part IV.A.1. Commentators have suggested that "seeking anti-suit injunctive relief is a very much inferior and less appropriate course" than attempting a *forum non conveniens* dismissal or soliciting the foreign court "to regulate its own process rather than have it controlled from afar [by an anti-suit injunction]." ANDREW BELL, *FORUM SHOPPING AND VENUE IN TRANSNATIONAL LITIGATION* 241 (2003).

Anti-suit injunction cases from the First, Second, Third, and Eighth Circuits are then considered. Analysis of the restrictive circuit anti-suit injunction cases reveals that American movants and foreign movants are treated much more evenhandedly in the restrictive circuits than in the liberal circuits.

### 1. *The Restrictive Circuit Standard*

In restrictive circuits, the movant must demonstrate that “(1) an action in a foreign jurisdiction would prevent United States jurisdiction or threaten a vital United States policy, and (2) the domestic interests outweigh concerns of international comity.”<sup>107</sup> Comity dominates the restrictive approach, and movants must meet a heavy burden to overcome the restrictive circuits’ presumption against issuing anti-suit injunctions.<sup>108</sup> In the following sections, the results of the survey are detailed by circuit.<sup>109</sup>

### 2. *Eighth Circuit*

In the Eighth Circuit, the most recent circuit to explicitly align itself with the restrictive approach,<sup>110</sup> American movants do not appear to have any significant advantage when petitioning courts for anti-suit injunctions. In *Goss Int’l Corp. v. Man Roland Druckmaschinen Aktiengesellschaft*,<sup>111</sup> the Eighth Circuit vacated a decision that had granted an American movant’s request for an anti-suit injunction to bar defendants, some of which were Delaware corporations and some that were foreign companies, from filing suit in Japan.<sup>112</sup> Consistent with the restrictive test, the *Goss* decision focuses almost exclusively on the issue of international comity.<sup>113</sup> The court noted

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<sup>107</sup> *Goss Int’l Corp. v. Man Roland Druckmaschinen Aktiengesellschaft*, 491 F.3d 355, 359 (8th Cir. 2007).

<sup>108</sup> *Gau Shan Co. v. Bankers Trust Co.*, 956 F.2d 1349, 1354 (6th Cir. 1992) (noting that “[c]omity dictates that foreign antisuit injunctions be issued sparingly and only in the rarest of cases”) (citing *Laker Airways*, 731 F.2d at 927).

<sup>109</sup> The following sections contain analysis of anti-suit injunction cases in restrictive circuits since 1999. The Sixth and D.C. Circuits have not decided a foreign anti-suit injunction case within this time frame and, as such, are not included in the analysis.

<sup>110</sup> Commentators once speculated that the Eighth Circuit followed the liberal approach. See Swanson, *supra* note 36, at 31.

<sup>111</sup> 491 F.3d at 356–357.

<sup>112</sup> *Id.* at 360–61.

<sup>113</sup> The court’s overwhelming concern with international comity in *Goss* demonstrates that the Eighth Circuit perhaps has one of the *most* restrictive versions of the restrictive approach. Commentary on the case’s Petition for Certiorari suggested that the *Goss* holding was so extreme in its concern with respecting foreign courts that it actually conflicted with the restrictive approach of the Second Circuit. See Posting of

that "a United States court may not prevent a foreign national from taking recourse to its own courts for relief under a foreign statute that does not interfere with the jurisdiction of the United States courts."<sup>114</sup> Even though allowing defendants to proceed with Japanese litigation could "effectively nullify the remedy [the American plaintiff] legitimately procured in the United States courts,"<sup>115</sup> the court found that the interests of international comity were too strong to grant an anti-suit injunction.<sup>116</sup>

A court in the Eighth Circuit again refrained from favoring an American movant in *Murphy Oil USA, Inc. v. SR International Business Insurance Co.*<sup>117</sup> The court denied the movant, an American corporation, an anti-suit injunction that would have prevented the foreign corporate defendants from proceeding with an action in England.<sup>118</sup> In rejecting the motion, the court found that international comity outweighed "any private interest that Murphy has in litigating its claims in an Arkansas forum. . . ."<sup>119</sup> Although the full effect of the Eighth Circuit's newly adopted restrictive approach has not yet been realized, it appears that the circuit avoids American protectionism in its decisions, focusing almost exclusively on the diplomatic consequences of issuing anti-suit injunctions.

### 3. Third Circuit

Like the Eighth Circuit, it appears that the Third Circuit tries to refrain from giving American movants any special preference in anti-suit injunction cases. In *General Electric Co. v. Deutz AG*,<sup>120</sup> the Third Circuit reversed a

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Charles Kotuby, *Comity at the Court: Three Recent Orders Seeking the View of the Solicitor General*, to Conflictoflaws.net, <http://www.conflictflaws.net/2008/cases/comity-at-the-court-three-recent-orders-seeking-the-view-of-the-solicitor-general/> (last visited Aug. 24, 2008) (noting that the Eighth Circuit's decision in *Goss* directly conflicts with the Second Circuit's decision in *Karaha Bodas Second Circuit*, 500 F.3d 111) (discussed in *infra* Part III.B.6.b). The Petition for Certiorari in *Goss* questioned the great weight given to the concept of international comity, framing the issue as "[w]hether the Eighth Circuit erred by giving dispositive weight to concerns about international comity at the expense of the courts' traditional duty to enforce U.S. law on U.S. soil and protect final judgments from relitigation." Petition for Writ of Certiorari at ii, *Goss Int'l Corp. v. Tokyo Kikai Seisakusho, Ltd.*, 2007 WL 3353450 (Oct. 15, 2007) (No. 07-618) (cert. denied).

<sup>114</sup> *Goss*, 491 F.3d at 362.

<sup>115</sup> *Id.* at 367.

<sup>116</sup> *Id.* at 362.

<sup>117</sup> No. 07-CV-1071, 2007 WL 2752366, at \*1 (W.D. Ark. Sept. 20, 2007).

<sup>118</sup> *Id.*

<sup>119</sup> *Id.* at \*5.

<sup>120</sup> 270 F.3d 144 (3d Cir. 2001).

district court decision that had granted an American manufacturer an injunction that barred a German corporation from appealing a decision to the ICC International Court of Arbitration.<sup>121</sup> Emphasizing that the circuit has a “serious concern for comity,” the court was not persuaded that any of the movant’s arguments about vexatiousness or oppressiveness outweighed the circuit’s overwhelming interest in preserving international comity.<sup>122</sup> In reaching its decision, the Third Circuit invoked the Supreme Court’s strong words from *M/S Bremen v. Zapata Off-Shore Co.*,<sup>123</sup> which caution against insisting on American law:

The expansion of American business and industry will hardly be encouraged if . . . we insist on a parochial concept that all disputes must be resolved under our laws and in our courts. . . . We cannot have trade and commerce in world markets . . . on our terms, governed by our laws, and resolved in our courts.<sup>124</sup>

The emphatic language in *General Electric*, the Third Circuit’s first anti-suit injunction case, casts a long shadow onto the two subsequent Third Circuit anti-suit injunction decisions.<sup>125</sup> Both cases demonstrate the circuit’s aversion to granting international anti-suit injunctions.<sup>126</sup> Interestingly, however, the case that involved an American movant led to the issuance of an anti-suit injunction,<sup>127</sup> and the case that involved a foreign movant led to

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<sup>121</sup> *Id.* at 161.

<sup>122</sup> *Id.* at 161.

<sup>123</sup> 407 U.S. 1, 10–12 (1972) (holding that a forum selection clause was *prima facie* valid and must be enforced by the court in absence of a countervailing reason making enforcement unreasonable).

<sup>124</sup> *Gen. Elec.*, 270 F.3d at 160 (3d Cir. 2001) (quoting *Bremen*, 407 U.S. at 9).

<sup>125</sup> See *Bro-Tech Corp. v. Thermax, Inc.*, No. 05-CV-2330, 2007 WL 2597618 (E.D. Pa. Sept. 4, 2007); *Younis Bros. & Co. v. CIGNA Worldwide Ins. Co.*, 167 F. Supp. 2d 743 (E.D. Pa. 2001).

<sup>126</sup> See *Bro-Tech*, 2007 WL 2597618, at \*3 (noting that the Third Circuit has “reflected its serious concern for comity, its respect for the sovereignty of other courts, and its faith in the ability of other courts to handle parallel proceedings in a fair and just manner without interference”); *Younis Bros.*, 167 F. Supp. 2d at 746 (noting that the Circuit’s restrictive approach “place[s] a premium on international comity” and compels a court to issue an anti-suit injunction only in narrow circumstances).

<sup>127</sup> *Younis Bros.*, 167 F. Supp. 2d at 746. In *Younis Bros.*, a Delaware corporation successfully moved to enjoin a Liberian group from pursuing litigation in Liberia. The Third Circuit took particular issue with Liberia’s “refusal to recognize the legitimacy of this Court’s final judgment[s].” *Id.* at 747. The Court frowned upon the foreign movant’s attempts to “get a ‘second opinion’ from the Liberian courts.” *Id.* (quoting *Gen. Elec. Co. v. Deutz AG*, 129 F. Supp. 2d 776, 787 (W.D. Pa. 2000)).

the denial of an anti-suit injunction.<sup>128</sup> Although this could suggest that the Third Circuit may still, at times, favor American movants, the strong statements in *General Electric* regarding the presumption against anti-suit injunctions suggest that the Third Circuit resists granting anti-suit injunctions regardless of the movants' nationality.<sup>129</sup>

#### 4. Eleventh Circuit

As with the Eighth and Third Circuits, the Eleventh Circuit has not indicated that it is concerned with protecting American parties through anti-suit injunctions. In *Kirby, PTY Ltd. v. Norfolk Southern Railway Co.*,<sup>130</sup> an American railroad company petitioned the court to enjoin an Australian company from pursuing action in Australia for cargo damage.<sup>131</sup> After detailing both the liberal and restrictive approaches, the court adopted the restrictive approach and denied the American movant's request.<sup>132</sup> The court placed much of the responsibility for the parallel litigation on the American movants, noting that had the railway wished to avoid burdensome litigation abroad, it could have contracted for a forum selection clause before the conflict arose.<sup>133</sup>

This year, the Eleventh Circuit reaffirmed its reluctance to grant anti-suit injunctions to American movants in *Canon Latin America, Inc. v. Lantech (CR), S.A.*<sup>134</sup> In *Canon*, the Eleventh Circuit reversed a decision of the lower court that had used the liberal approach to grant an anti-suit injunction to an American movant against a Costa Rican company.<sup>135</sup> The Eleventh Circuit

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<sup>128</sup> *Bro-Tech*, 2007 WL 2597618, at \*1. In *Bro-Tech*, a United Kingdom citizen living in the United States petitioned the district court for an anti-suit injunction that would prevent a Delaware corporation from pursuing parallel litigation in the United Kingdom. *Id.* The court noted its "utmost confidence in and respect" for the U.K. court and stated that it was not concerned over whether its judgments would be threatened by foreign parallel litigation. *Id.* at \*3-4.

<sup>129</sup> As discussed in *supra* note 124, the case that granted the anti-suit injunction to the American plaintiff still noted that anti-suit injunctions should only be granted in extraordinary situations. *Younis Bros.*, 167 F. Supp. 2d at 746.

<sup>130</sup> 71 F. Supp. 2d 1363 (N.D. Ga. 1999).

<sup>131</sup> *Id.* at 1365.

<sup>132</sup> *Id.* at 1370. The court was particularly critical of the liberal approach, noting that it "too freely allows courts to invade the jurisdiction of sovereign governments." *Id.*

<sup>133</sup> *Id.* at 1369-70.

<sup>134</sup> 508 F.3d 597, 602 (11th Cir. 2007).

<sup>135</sup> *Id.* at 602. Because the Eleventh Circuit decided this case by settling the threshold question of whether the U.S. action was the same as the foreign action to be enjoined, the Eleventh Circuit did not explicitly affirm that the circuit uses the restrictive approach for all anti-suit injunction cases. Press coverage, however, suggests that the



reasoned that, because the Costa Rican company's action in Costa Rica "hinge[d] on statutory rights that are unique to Costa Rica," an anti-suit injunction would be inappropriate.<sup>136</sup> This decision is particularly interesting because the two parties had a forum selection clause in their contract that stated that all disputes shall be litigated in and governed by Florida state law.<sup>137</sup> Therefore, the Eleventh Circuit appears to place so much weight on international comity that it is willing to let comity eclipse even the express contractual agreements of the parties.

### 5. First Circuit

The First Circuit generally follows the restrictive test when considering anti-suit injunction motions, but has adopted the approach with some qualifications.<sup>138</sup> Because the First Circuit has considered so few anti-suit injunction cases, it is difficult to ascertain whether the circuit focuses as exclusively on international comity as the other restrictive circuits.

In *Quaak v. Klynveld Peat Marwick Goerdeler Bedrijfsrevisoren*,<sup>139</sup> the First Circuit upheld the issuance of a foreign anti-suit injunction against a Belgian company in a securities fraud action.<sup>140</sup> Noting the public policy of shielding investors against fraud, as well as the importance of upholding the court's jurisdiction, the First Circuit protected the American movants' interest in avoiding foreign litigation.<sup>141</sup> That the *Quaak* court afforded this protection to the American movants is particularly interesting given the court's reasoning. In the opinion, the First Circuit claimed to "elevate[] comity into a pivotal role in the antisuit analysis,"<sup>142</sup> yet the court still granted the anti-suit injunction. If comity is indeed such an important factor to the First Circuit, then it is somewhat surprising that the *Quaak* court allowed the American movant's interests to trump international comity.<sup>143</sup>

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Eleventh Circuit is understood as a restrictive circuit, consistent with the district court reasoning in *Kirby*. See discussion and accompanying text in *supra* notes 124–30; Jordana Mishory, *International Business Disputes May Be Tough To Resolve in U.S.*, BROWARD DAILY BUS. REV., Dec. 12, 2007, at 1 (noting that the Eleventh Circuit decision "could make it more difficult for companies to ensure international disputes are litigated in American courts when similar actions are pending in other countries").

<sup>136</sup> *Canon*, 508 F.3d at 602.

<sup>137</sup> *Id.* at 599.

<sup>138</sup> See Tan, *Anti-Suit Injunctions*, *supra* note 12, at 291.

<sup>139</sup> 361 F.3d 11 (1st Cir. 2004).

<sup>140</sup> *Id.* at 14.

<sup>141</sup> *Id.* at 20.

<sup>142</sup> Tan, *Enforcing Arbitration*, *supra* note 17, at 595.

<sup>143</sup> The internet buzz generated by the case seems to hail the decision as an American victory over a recalcitrant foreign corporation. One Houston attorney

The First Circuit's only other anti-suit injunction case follows the test for anti-suit injunctions set out in *Quaak*, and reaches a decision that denies American movants an anti-suit injunction to bar proceedings in Moscow.<sup>144</sup> In *Athina Investments Ltd. v. Pinchuk*, the court acknowledged the hardship that the American movants might face attempting to litigate in Russia, yet stated that it could "envision no scenario under which comity would not carry the day."<sup>145</sup> Thus, although *Quaak* emphasized comity and then favored the American plaintiff, the application of *Quaak* may lead to decisions that do not favor American movants.

## 6. Second Circuit

Party nationality does not appear to have a substantial effect on the Second Circuit's decisions on anti-suit injunction.<sup>146</sup> Since 1999, the Second Circuit has granted three anti-suit injunctions to American movants<sup>147</sup> and has denied three anti-suit injunctions to American movants.<sup>148</sup> Foreign movants have had similar results in the Second Circuit: courts have granted foreign movants anti-suit injunctions three times<sup>149</sup> and denied anti-suit

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proclaimed that the decision "provide[d] some hope for weary plaintiffs" who are burdened with the task of dealing with foreign corporations and proclaimed that the First Circuit decision "[stuck] it to KPMG-Belgium." Posting of Tom Kirkendall to Houston's Clear Thinkers, [http://blog.kir.com/archives/2004/03/first\\_circuit\\_s.asp](http://blog.kir.com/archives/2004/03/first_circuit_s.asp) (Mar. 17, 2004, 10:05 EST).

<sup>144</sup> *Athina Invs. Ltd. v. Pinchuk*, 443 F. Supp. 2d 177, 178 (D. Mass. 2006).

<sup>145</sup> *Id.* at 182.

<sup>146</sup> Professor Treviño de Coale's analysis of Second Circuit caselaw prior to 1999 suggested that in contrast to the liberal circuits, "the citizenship of the plaintiff does not seem [to] play a role in the [Second Circuit's] decision of whether foreign parallel litigation continues." Treviño de Coale, *supra* note 17, at 107. As described in this section, subsequent decisions mostly confirm this hypothesis.

<sup>147</sup> See *Int'l Equity Invs., Inc. v. Opportunity Equity Partners*, 427 F. Supp. 2d 491, 492 (S.D.N.Y. 2006); *MasterCard Int'l. Inc. v. Fédération Internationale de Football Ass'n (FIFA)*, No. 06 Civ. 3036(LAP), 2007 WL 631312, at \*1 (S.D.N.Y. Feb. 28, 2007); *Paramedics Electromedicina Comercial, Ltda. v. GE Med. Sys. Info. Techs.*, 369 F.3d 645, 649 (2d Cir. 2004).

<sup>148</sup> See *Space Imaging Europe, Ltd. v. Space Imaging L.P.*, No. 98 Civ. 2291(DC), 1999 WL 511759, at \*1 (S.D.N.Y. Jul. 19, 1999); *Hamilton Bank, N.A. v. Kookmin Bank*, 999 F. Supp. 586, 591 (S.D.N.Y. 1998); *Comverse, Inc. v. Am. Telecomm., Inc.*, No. 06 Civ. 6825(PKL), 2006 WL 3016315, at \*1 (S.D.N.Y. Oct. 23, 2006).

<sup>149</sup> See *Telenor Mobile Commc'ns AS v. Storm LLC*, 524 F. Supp. 2d 332, 336 (S.D.N.Y. 2007); *Ibeto Petrochemical Indus. Ltd. v. M/T Beffen*, 475 F.3d 56, 65 (2d Cir. 2007); *Karaha Bodas Second Circuit*, 500 F.3d 111, 113 (2d Cir. 2007).

injunctions twice.<sup>150</sup> The following parts detail the Second Circuit's anti-suit injunction cases, analyzing the American-movant cases separately from foreign-movant cases.

### a. *American Movants*

Party nationality does not appear to be a significant consideration in cases granting anti-suit injunctions to American movants. In *International Equity Investments, Inc. v. Opportunity Equity Partners, Ltd.*, the court granted an anti-suit injunction to a Delaware corporation that barred Brazilian and Cayman Islands defendants from filing actions in Brazil.<sup>151</sup> The court did so while noting that the American movant was "not a widow or an orphan" that needed the protection of the American courts.<sup>152</sup> Even so, the court found that an anti-suit injunction was equitable because the parties' partnership agreement had provided for litigation only in America.<sup>153</sup> The court in *MasterCard International Inc. v. Federation Internationale de Football Ass'n* (FIFA) granted an anti-suit injunction to a Delaware corporation when it believed that FIFA, a Swiss association, had behaved improperly.<sup>154</sup> The *MasterCard* Court did not explicitly factor the citizenship of the moving party into its analysis.<sup>155</sup>

The only other case granting an American movant an anti-suit injunction is *Paramedics Electromedicina Comercial, Ltda. v. GE Medical Systems Information Technologies, Inc.*<sup>156</sup> This landmark case presents an important

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<sup>150</sup> See *Empresa Generadora de Electricidad Itabo, S.A. v. Corporación Dominicana de Empresas Eléctricas Estatales*, No. 05 Civ. 5004 RMB, 2005 WL 1705080, at \*1 (S.D.N.Y. July 18, 2005); *LAIF X SPRL v. Axtel, S.A. de C.V.*, 390 F.3d 194, 196–97 (2d Cir. 2004).

<sup>151</sup> 427 F. Supp. 2d at 502.

<sup>152</sup> *Id.* at 500.

<sup>153</sup> *Id.* at 502.

<sup>154</sup> No. 06 Civ. 3036(LAP), 2007 WL 631312, at \*8 (S.D.N.Y. Feb. 28, 2007). The court called FIFA's action of pursuing arbitration in a Switzerland tribunal "a paradigm of bad faith forum shopping" and noted that FIFA's assertion that Swiss proceedings would not be inconvenient to the American plaintiff were "so obviously untrue as to be astounding." *Id.*

<sup>155</sup> *Id.* at \*9. A hint of American protectionism may nevertheless be present in *MasterCard*. It appears that the court expanded the Second Circuit's restrictive anti-suit injunction test in order to grant the American movant's petition. The court invoked a federal policy that it had not used before in anti-suit injunction analysis: "Although a less weighty policy consideration [than a previous policy used to grant an anti-suit injunction] . . . the general policy of protecting final judgments . . . weighs in favor of issuing the anti-suit injunction." *Id.* By asserting this federal policy, the court was able to protect the American movant from vexatious litigation.

<sup>156</sup> 369 F.3d 645, 658 (2d Cir. 2004).

contrast with another case, *LAIF X SPRL v. Axtel, S.A. de C.V.*,<sup>157</sup> and both cases are discussed in detail in Part III.B.6.c, *infra*.

The Second Circuit has exhibited willingness to deny anti-suit injunctions to American movants. In *Space Imaging Europe, Ltd. v. Space Imaging L.P.*, the court denied a Delaware corporation's request to issue an anti-suit injunction against European defendants seeking to litigate in Greece.<sup>158</sup> The court examined the facts surrounding the trademark claim and found that nothing about Greek litigation would interfere with the jurisdiction or the policies of the U.S. court.<sup>159</sup> In *Hamilton Bank, N.A. v. Kookmin Bank*, the court refused an American bank's request to prevent a Korean bank from pursuing an already-pending parallel suit in Korea.<sup>160</sup> Because the Korean suit had been filed before the American action, the court refused the American movant's invitation "to oust the Korean court of the ability to proceed with a lawsuit."<sup>161</sup>

Similarly, *Comverse, Inc. v. American Telecommunications, Inc.* denied a Delaware corporation's motion to enjoin a Chilean company from proceeding with an already-filed action in Chile.<sup>162</sup> The *Comverse* Court acknowledged that allowing Chilean proceedings to go forward may substantially affect the interests of the parties, but found that the private parties' concern over the outcome of the conflict was "incidental to the [Chilean] tribunal's stated purpose of safeguarding the freedom of economic markets in the public interest."<sup>163</sup> Thus, the Second Circuit appears willing to set aside the equity interests of American movants to preserve international comity.

#### b. Foreign Movants

In contrast to liberal circuits, in which foreign movants were not able to procure an anti-suit injunction during the period of this survey, the Second Circuit has granted an anti-suit injunction to a foreign movant about as often as it has denied an anti-suit injunction. For example, in *Telenor Mobile Communications AS v. Storm LLC*, the court upheld an arbitral panel's grant of an anti-suit injunction to a Norwegian company enjoining an action by a

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<sup>157</sup> 390 F.3d 194 (2d Cir. 2004).

<sup>158</sup> No. 98 Civ. 2291(DC), 1999 WL 511759, at \*7 (S.D.N.Y. July 19, 1999). The defendants consisted of a Greek citizen and a United Kingdom corporation. *Id.* at \*1.

<sup>159</sup> *Id.* at \*7.

<sup>160</sup> 999 F. Supp. 586, 587 (S.D.N.Y. 1998).

<sup>161</sup> *Id.* at 588.

<sup>162</sup> No. 06 Civ. 6825(PKL), 2006 WL 3016315, at \*1 (S.D.N.Y. Oct. 23, 2006).

<sup>163</sup> *Id.* at \*4.

Ukrainian company in Ukraine.<sup>164</sup> In *Ibeto Petrochemical Industries Ltd. v. M/T Beffen*, the court upheld an anti-suit injunction barring a Nigerian company from pursuing an action against a Norwegian movant in Nigerian courts.<sup>165</sup>

The difference between liberal circuits and restrictive circuits is illuminated in *Karaha Bodas Co. v. Perusahaan Pertambangan Minyak Dan Gas Bumi Negara*.<sup>166</sup> In *Karaha Bodas*, the Second Circuit awarded an anti-suit injunction to a Cayman Islands company.<sup>167</sup> The *Karaha Bodas* case in the Second Circuit arose out of the same conflict as the *Karaha Bodas* case litigated in the Fifth Circuit, where an anti-suit injunction had been denied four years earlier.<sup>168</sup> That the two cases led to different results illuminates the distinction between the two approaches and suggests that restrictive circuits are more willing to grant anti-suit injunctions to foreign movants than liberal circuits.

Foreign movants do not always receive anti-suit injunctions in the Second Circuit. In *Empresa Generadora de Electricidad Itabo, S.A. v. Corporación Dominicana de Empresas Eléctricas Estables*, the court denied a Dominican Republic company's attempt to enjoin proceedings in the Dominican Republic.<sup>169</sup> The court found that the movant had failed to meet

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<sup>164</sup> 524 F. Supp. 2d 332, 359 (S.D.N.Y. 2007). The court did so in its capacity as a court of secondary jurisdiction under the New York Arbitration Convention. In upholding the anti-suit injunction, the court affirmed that an arbitral panel may permissibly grant an anti-suit injunction as part of an arbitration decision. *Id.* at 363–64.

<sup>165</sup> 475 F.3d 56, 64–65 (2d Cir. 2007).

<sup>166</sup> 500 F.3d 111, 113–14 (2d Cir. 2007).

<sup>167</sup> *Id.* at 113. The injunction barred an oil and gas company controlled by the Indonesian government from pursuing a fraud claim in the Cayman Islands. *Id.* As referenced *supra*, note 113, a Petition for Certiorari for this case was filed; the Indonesian Republic weighed in with an Amicus Brief requesting that the anti-suit injunction be revoked. Brief of the Republic of Indonesia as Amicus Curiae in Support of Petitioner, PT Pertamina (Persero) v. Karaha Bodas Co., 128 S. Ct. 2958 (2008) (No. 07-619).

<sup>168</sup> See *Karaha Bodas Fifth Circuit*, 335 F.3d 357 (5th Cir. 2003), discussed in *supra* Part III.A.2. In 2003, the *Karaha Bodas* case out of the Fifth Circuit vacated an anti-suit injunction to stop Indonesian proceedings to annul a Swiss arbitration award. *Karaha Bodas Fifth Circuit*, 335 F.3d at 360. Several years later, the dispute had not been resolved, and the foreign movant brought an action to enforce the arbitration award in the Second Circuit, where New York trust accounts were located. When further attempts were made to vex the enforcement of the arbitration award, the Second Circuit entered an anti-suit injunction to prevent any further proceedings. *Karaha Bodas Second Circuit*, 500 F.3d at 113. Perhaps the anti-suit injunction was granted in the Second Circuit in 2007 and not in the Fifth Circuit in 2003 because the conflict had dragged on so long and the Second Circuit wanted to resolve the matter. Nevertheless, it is interesting that a comity-focused restrictive circuit would grant an anti-suit injunction to a foreign movant when an equity-based liberal circuit would not.

<sup>169</sup> No. 05 CIV 5004 RMB, 2005 WL 1705080, at \*1 (S.D.N.Y. Jul. 18, 2005).

its "heavy burden" to show the need for an anti-suit injunction.<sup>170</sup> The court further stated that, even if the movant had a compelling case for an anti-suit injunction, principles of comity would prevent the court from granting an anti-suit injunction.<sup>171</sup> Thus, it appears that comity is the primary factor driving anti-suit injunctions in the Second Circuit. The next subsection, however, will suggest that party nationality may occasionally affect the Second Circuit's analysis.

### c. *Paramedics and LAIF X SPRL: American and Foreign Movants Compared*

There is a possibility that the citizenship of the moving party has affected moving parties' opportunities for receiving an anti-suit injunction in the Second Circuit. This becomes evident by comparing two similar cases, *Paramedics Electromedicina Comercial, Ltda. v. GE Medical Systems Information Technologies*<sup>172</sup> and *LAIF X SPRL v. Axtel, S.A. de C.V.*<sup>173</sup>

In *Paramedics*, the Second Circuit affirmed an anti-suit injunction for a Wisconsin corporation, GE Medical, against a Brazilian company, Tecnimed.<sup>174</sup> The opinion recited the circuit's restrictive approach to anti-suit injunctions, yet then decided to affirm the anti-suit injunction.<sup>175</sup> The court derived its reasoning from two sources: (1) a notion that "[t]he federal policy favoring the liberal enforcement of arbitration clauses" is a sufficiently important federal policy to warrant an anti-suit injunction;<sup>176</sup> and (2) that considerations of comity "have diminished force" because the district court had reached a judgment on the dispute between the parties.<sup>177</sup>

The reasoning in *Paramedics* "may not be supportable."<sup>178</sup> Scholar Daniel Tan has suggested that, if taken literally, the comity reasoning in

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<sup>170</sup> *Id.* at \*8.

<sup>171</sup> *Id.* at \*9.

<sup>172</sup> 369 F.3d 645 (2d Cir. 2004).

<sup>173</sup> 390 F.3d 194 (2d Cir. 2004).

<sup>174</sup> 369 F.3d at 649. GE Medical had attempted to begin arbitration proceedings with Tecnimed in a New York state court by invoking an arbitration clause in the parties' distributorship agreement. *Id.* Tecnimed responded to the call for arbitration by initiating a Brazilian lawsuit against GE Medical and petitioning the New York state court for a stay of arbitration. *Id.* Following Tecnimed's actions, GE Medical removed the action to federal district court and requested both an order compelling arbitration and an anti-suit injunction to stop Tecnimed from pursuing the Brazilian lawsuit. *Id.* The district court granted the motion to compel arbitration as well as the anti-suit injunction. *Id.*

<sup>175</sup> *Id.*

<sup>176</sup> *Id.* at 654.

<sup>177</sup> *Id.* at 655.

<sup>178</sup> Tan, *Enforcing Arbitration*, *supra* note 17, at 564.

*Paramedics* “reduce[s] the standard of issuance for antisuit injunctions on appeal, without any principled basis for this.”<sup>179</sup> Rather than representing a reduced standard for anti-suit injunctions, however, it is possible that the court’s opinion in *Paramedics* was partially influenced by the nationality of the plaintiff. This possibility emerges not from the text of the *Paramedics* opinion, but rather from *LAIF X*, a subsequent case interpreting *Paramedics*.

In *LAIF X SPRL v. Axtel, S.A. de C.V.*, a Belgian investor, LAIF X, petitioned the court for an anti-suit injunction against a Mexican corporation, Telinor.<sup>180</sup> The factual circumstances are similar to those of *Paramedics*.<sup>181</sup> Under the reasoning of *Paramedics*, which cited the federal policy in favor of arbitration as a sufficient reason for granting an anti-suit injunction, the bare facts of *LAIF X* suggest that the Second Circuit might have had sufficient reasons to grant LAIF X an anti-suit injunction.<sup>182</sup> Although purporting to apply *Paramedics* reasoning, the Second Circuit reached the opposite result, and affirmed the district court’s denial of LAIF X’s petition.<sup>183</sup> The court’s reasoning seems to have at least implicitly included a consideration of the fact that both of the parties were foreign entities: the court stated that “the legal relationship between a Belgian investor and a Mexican enterprise in no way implicates ‘the strong public policies of the enjoining forum. . . .’”<sup>184</sup>

*LAIF X* and *Paramedics* were written by the same Circuit Judge and decided within months of each other; it follows that there must be a way to harmonize these factually similar cases.<sup>185</sup> If the federal policy favoring arbitration is really a sufficient policy to justify granting an anti-suit

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<sup>179</sup> *Id.* (noting that “[a]n appellate court cannot bootstrap a lower court’s decision to bolster its own, but must instead review the lower court’s decision to see if it was correctly made.”).

<sup>180</sup> 390 F.3d 194 (2d Cir. 2004).

<sup>181</sup> See Tan, *Enforcing Arbitration*, *supra* note 17, at 565. The facts are as follows: Pursuant to an arbitration agreement, LAIF X filed an arbitration demand with the American Arbitration Association. *LAIF X*, 390 F.3d at 196–97. Prior to answering the demand for arbitration, Telinor filed suit in Mexico against LAIF X. *Id.* LAIF X subsequently petitioned the district court for an order to compel arbitration and an anti-suit injunction that would bar Telinor from pursuing the Mexican litigation any further. *Id.*

<sup>182</sup> Tan, *Enforcing Arbitration*, *supra* note 17, at 566.

<sup>183</sup> 390 F.3d at 196–97.

<sup>184</sup> 390 F.3d at 200 (quoting *Paramedics Electromedicina Comercial, Ltda. v. GE Med. Sys. Info. Techs., Inc.*, 369 F.3d 645, 652 (2d Cir. 2004)). An interesting point for further study would be to consider whether the perceived competence of the foreign court affects whether an anti-suit injunction is issued. For example, it could be illuminating to study whether anti-suit injunctions are more likely to issue against a country with a judicial system very different from the United States’ in comparison to countries with a similar judicial system, such as the United Kingdom.

<sup>185</sup> See Tan, *Enforcing Arbitration*, *supra* note 17, at 566–67.

injunction, then perhaps something else is at play in these cases. Perhaps in the situation of *Paramedics* and *LAIF X* the court was more comfortable granting an anti-suit injunction to an American movant than it was granting an anti-suit injunction in a case involving a dispute between two foreign parties.

### 7. *Analysis of Restrictive Circuits*

Across the restrictive circuits, it appears that American movants and foreign movants have about the same likelihood of receiving an anti-suit injunction. As depicted below, foreign movants in restrictive circuits appear to have a substantially greater chance of receiving an anti-suit injunction in a restrictive circuit than they do in liberal circuits.<sup>186</sup> In contrast, American movants are much less likely to receive an anti-suit injunction in restrictive circuits than in liberal circuits.<sup>187</sup> Although individual comparison of factually similar U.S. movant cases and foreign movant cases suggests that party nationality may occasionally factor into the restrictive courts' decisions,<sup>188</sup> viewing the data in the aggregate demonstrates that restrictive circuits do not generally engage in American protectionism.

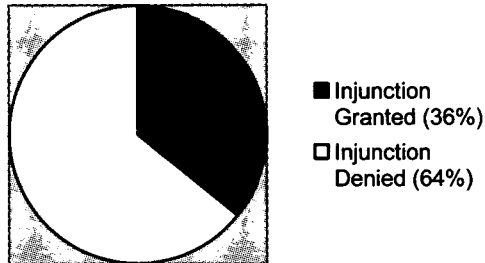
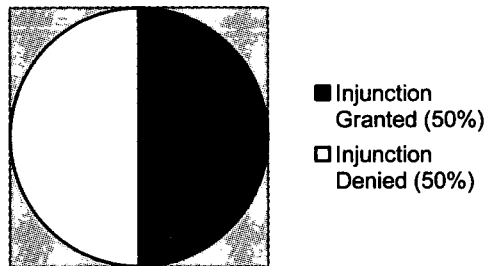
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<sup>186</sup> See *supra* Part III.A.5.

<sup>187</sup> See *supra* Part III.A.5.

<sup>188</sup> See, e.g., discussion of *Paramedics* and *LALX*, two substantially similar cases that receive different treatment by the Second Circuit, *supra* Part III.B.6.c.



American Movants in Restrictive Circuits<sup>189</sup>Foreign Movants in Restrictive Circuits<sup>190</sup>

<sup>189</sup> *Goss*, 491 F.3d 355 (8th Cir. 2007) (injunction denied); *Murphy Oil*, 2007 WL 2752366 (injunction denied); *Gen. Elec.*, 270 F.3d 144 (injunction denied); *Canon*, 508 F.3d 597 (injunction denied); *Kirby*, 71 F. Supp. 2d 1363 (injunction denied); *Space Imaging*, 1999 WL 511759 (injunction denied); *Hamilton Bank*, 999 F. Supp. 586 (injunction denied); *Comverse*, 2006 WL 3016315 (injunction denied); *Athina*, 443 F.Supp.2d 177 (injunction denied); *Younis Bros.*, 167 F. Supp. 2d 743 (injunction granted); *Int'l Equity*, 427 F. Supp. 2d 491 (injunction granted); *MasterCard*, 2007 WL 631312 (injunction granted); *Paramedics*, 369 F.3d 645 (injunction granted); *Quaak*, 361 F.3d 11 (injunction granted).

<sup>190</sup> *Telenor*, 524 F. Supp. 2d 332 (injunction granted); *Ibeto*, 475 F.3d 56 (injunction granted); *Karaha Bodas Second Circuit*, 500 F.3d 111 (injunction granted); *Empresa*, 2005 WL 1705080 (injunction denied); *LAIF X SPRL*, 390 F.3d 194 (injunction denied); *Bro-Tech*, 2007 WL 2597618 (injunction denied).

The structure of the restrictive test may be why American movants and foreign movants receive anti-suit injunctions with about the same frequency in restrictive circuits. Because the restrictive test does not specifically require courts to consider equity or convenience, the test does not automatically tilt the balance in favor of American movants. Furthermore, foreign movants may actually have better prospects of receiving anti-suit injunctions under the restrictive test because of the great weight given to international comity: by choosing to petition an American court for action, the foreign movant indicates willingness to forego the protections of their home court in order to litigate in the United States.<sup>191</sup> As such, foreign movants who receive the anti-suit injunctions they request are not likely to complain to their home court about the U.S. courts' decisions. Both the aggregate data and the construction of the circuits' tests suggest that foreign movants and American movants have about the same likelihood of receiving an anti-suit injunction in restrictive circuits, while foreign movants are at a disadvantage in liberal circuits. In the next section, some of the limitations of this conclusion are explored.

### *C. Limitations of the Survey*

Because this empirical survey examines anti-suit injunction cases only since 1999, there are limits on the conclusions this Note can reach. Although anti-suit injunctions have a profound impact when they do occur,<sup>192</sup> the number of anti-suit injunction cases dealt with by federal courts between 1999 and 2008 is somewhat small. Given the small number, the effect of party nationality on anti-suit injunction issuance can be discussed only in terms of trends. In addition, some circuits have only recently adopted an approach for evaluating anti-suit injunctions,<sup>193</sup> so the subsequent caselaw needs time to develop before making more definite conclusions. Therefore, the reach of this Note is constrained by the relatively small pool of available caselaw.

Although the purpose of this survey was to isolate the nationality of the moving party, focusing the analysis primarily on one factor limits this Note's

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<sup>191</sup> A foreign movant's choice to appear in an American court should not be dispositive in deciding that an anti-suit injunction should issue. America is perceived as more advantageous for plaintiffs than foreign forums. See John Fellas, *Parallel Proceedings*, 599 PRACTISING LEGAL INSTITUTE, LITIGATION AND ADMINISTRATIVE PRACTICE COURSE HANDBOOK SERIES 133, 140 (Feb. 1999). Therefore, foreign plaintiffs with the resources and with enough at stake may find an American forum more protective than their home forum. International comity is not served by having American courts issue anti-suit injunctions to foreign movants that are blatantly forum-shopping.

<sup>192</sup> See *supra* note 8.

<sup>193</sup> See discussion *supra* Parts III.B.2, III.B.3.

conclusions. The language of some opinions certainly suggests pro-American bias, but, in general, such protectionism is not explicit.<sup>194</sup> There also are a number of other factors that may have affected individual case decisions. For example, quality of counsel,<sup>195</sup> perceived fraudulent actions in foreign countries,<sup>196</sup> or failing to meet threshold jurisdictional requirements<sup>197</sup> could all be reasons that an anti-suit injunction is not granted in a particular case.

Despite the limitations of the survey, the data viewed in the aggregate still suggests that party nationality may affect the ease with which a party obtains an anti-suit injunction in liberal circuits.<sup>198</sup> In addition, the construction of the two different tests amplifies this conclusion. The liberal circuit approach allows the court to consider equity, which in turn may allow for implicit bias to affect the analysis.<sup>199</sup> In contrast, the restrictive circuit approach confines the inquiry to issues of international comity, which by its very nature is not pro-American. Though other factual circumstances certainly cannot be ignored, viewing the cases across the circuits and in light of the structure of the two tests demonstrates that liberal circuits are more likely to favor American movants than restrictive circuits.

#### IV. RECOMMENDATIONS

Analysis of anti-suit injunction cases across the circuits suggests that the moving party's nationality is more likely to be a factor in the liberal circuits' decisions about whether to issue an anti-suit injunction than in the restrictive circuits' decisions.<sup>200</sup> As detailed below, using a test that tends to favor

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<sup>194</sup> See *E. & J. Gallo Winery*, 446 F.3d 984, 995, discussed *supra* Part III.A.4.

<sup>195</sup> See *U.S. Commodity Futures Trading Comm'n v. Lake Shore Asset Mgmt. Ltd.*, No. 07 C 3598, 2007 WL 2915647, at \*1 (N.D. Ill. Oct. 4, 2007), discussed *supra* Part III.A.3.

<sup>196</sup> See *E. & J. Gallo*, 446 F.3d at 995, discussed *supra* Part III.A.4.

<sup>197</sup> See *Canon Latin Am., Inc., v. Lantech (CR)*, S.A., 508 F.3d 597, 602 (11th Cir. 2007) discussed *supra* Part III.B.4. One could also argue that, because it cannot be concluded that a case would have come out differently had the nationality of the party been different, nationality cannot be shown to be a factor in anti-suit injunction analysis. In most situations, speculating about alternative outcomes is difficult because of the fact-specific nature of the cases. That does not mean that nationality is not a factor, however. There is an example of like parties being treated differently in a liberal circuit than in a restrictive circuit. See discussion *supra* note 168. Furthermore, there is an example of different treatment between similarly situated parties in the same circuit. See discussion *supra* Part III.B.6.c. With very little to distinguish those cases except the moving party's nationality, these cases provide anecdotal evidence that bolsters the empirical findings.

<sup>198</sup> See *supra* Part III.A.5.

<sup>199</sup> See *supra* Part III.A.5.

<sup>200</sup> See discussion *supra* Parts III.A.5, III.B.7.

American movants as the liberal test does is a dangerous manner in which to decide these diplomatically volatile cases. Because of this, the Supreme Court should adopt the restrictive test.

### *A. Favoring American Movants is Inappropriate for Anti-Suit Injunction Motions*

Because of the controversial nature of anti-suit injunctions, courts should not be using a test that yields results more favorable to American movants than to foreign movants, even though the Supreme Court has recognized that favoring an American movant is acceptable in the related doctrine of forum non conveniens. Anti-suit injunctions may be a useful tool in exceptional circumstances, but the diplomatic ramifications are too great for courts to be using a test that might treat litigants less than evenhandedly.<sup>201</sup>

#### *1. Anti-Suit Injunctions Raise Different Concerns than Pro-American Forum Non Conveniens Decisions*

The Supreme Court allows courts to favor American plaintiffs in the related action of forum non conveniens dismissals, but pro-American favoritism is not appropriate in anti-suit injunction analysis. In the forum non conveniens context, courts favor the American plaintiffs' choice of forum.<sup>202</sup> When an American plaintiff chooses a U.S. court as the forum for litigation, courts are likely to deny the opposing party's motion for a forum non conveniens dismissal, because courts presume that the American plaintiff was not vexatiously forum shopping when filing the suit.<sup>203</sup> In contrast, when a foreign plaintiff attempts to bring an action in an American court, courts

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<sup>201</sup> The anti-suit injunction issue has the potential to make Europeans particularly upset. As Professor Ralf Michaels has noted, "Europeans frequently accuse U.S. courts of judicial hegemonialism, because U.S. courts assert jurisdiction without regard to other countries." Ralf Michaels, *Two Paradigms of Jurisdiction*, 27 MICH. J. INT'L L. 1003, 1058 (2006).

<sup>202</sup> See *Piper Aircraft Co. v. Reyno*, 454 U.S. 235, 255-56 (1981). In *Piper*, the Supreme Court noted that: "[A] plaintiff's choice of forum is entitled to greater deference when the plaintiff has chosen the home forum. . . . When the plaintiff is foreign, however, this assumption is much less reasonable. Because the central purpose of any *forum non conveniens* inquiry is to ensure that the trial is convenient, a foreign plaintiff's choice deserves less deference." *Id.* (citation omitted).

<sup>203</sup> See, e.g., *id.*; see RONALD A. BRAND & SCOTT R. JABLONSKI, FORUM NON CONVENIENS: HISTORY, GLOBAL PRACTICE, AND FUTURE UNDER THE HAGUE CONVENTION ON CHOICE OF COURT AGREEMENTS 58 (2007) (discussing the presumption in favor of American plaintiffs in forum non conveniens cases).

are likely to suspect that forum shopping is present.<sup>204</sup> Therefore, based on the assumption that American litigation is ordinarily inconvenient for a foreign plaintiff, courts are more likely to dismiss cases brought by foreign plaintiffs on forum non conveniens grounds.<sup>205</sup>

Because favoring American plaintiffs is not wrought with the same complications as favoritism in anti-suit injunction cases, the reasoning that supports favoring American plaintiffs' choice of forum in forum non conveniens cases does not support favoring American movants in anti-suit injunction cases.<sup>206</sup> When a court denies a forum non conveniens dismissal it does not bar proceedings in a foreign court, it simply retains its own jurisdiction. In contrast, anti-suit injunctions essentially assert that the United States is in a better position than the foreign court to judge the action and that the foreign action should be barred as a result.<sup>207</sup> Forum non conveniens dismissals defer to foreign courts; anti-suit injunctions attempt to shut the foreign courthouses' doors.

## 2. *Pro-American Anti-Suit Injunctions are Detrimental and Preventable*

To avoid repercussions for American claimants litigating abroad, courts should only grant anti-suit injunctions in exceptional circumstances.<sup>208</sup> If the United States continually favors its own citizens over foreign parties, it cannot expect that its own citizens will receive fair treatment in foreign courts.<sup>209</sup> Furthermore, because foreign courts have discretion over whether

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<sup>204</sup> See *Iragorri v. United Techs.*, 274 F.3d 65, 71–72 (2d Cir. 2001) (“[T]he more it appears that the [foreign] plaintiff’s choice of a U.S. forum was motivated by forum-shopping reasons—such as attempts to win a tactical advantage . . . the easier it becomes for the defendant to succeed on a *forum non conveniens* motion. . .”).

<sup>205</sup> See, e.g., *id.*

<sup>206</sup> Commentators have criticized the presumption against foreign plaintiffs in the forum non conveniens context. See generally, Jacqueline Duval-Major, Note, *One-Way Ticket Home: The Federal Doctrine of Forum Non Conveniens and the International Plaintiff*, 77 CORNELL L. REV. 650 (1992); John R. Wilson, Note, *Coming to America to File Suit: Foreign Plaintiffs and the Forum Non Conveniens Barrier in Transnational Litigation*, 65 OHIO ST. L.J. 659 (2004).

<sup>207</sup> See Teitz, *Foreign Judgments*, *supra* note 21, at 25.

<sup>208</sup> See Steven R. Swanson, *Antisuit Injunctions in Support of International Arbitration*, 81 TUL. L. REV. 395, 404–05 (2006–2007). Swanson discusses how the superficial ease of granting an anti-suit injunction has tremendous ramifications for future cases. He argues that giving respect to foreign nations’ jurisdiction “furthers [the United States’] own interest in not being ignored in the future.” *Id.* at 404.

<sup>209</sup> *Id.* at 404–05. Swanson notes that when courts fail to respect international comity they “may find their own decisions disdained by other countries’ courts . . . be unable to

to respect a U.S. anti-suit injunction, U.S. courts should issue anti-suit injunctions only when the circumstances truly require it.<sup>210</sup> By protecting U.S. movants in anti-suit injunction cases, U.S. courts erode their own credibility abroad, make matters more difficult for American citizens who end up in foreign courts, and contravene principles of international cooperation.<sup>211</sup>

Moreover, anti-suit injunction cases arise largely out of issues between businesses that chose to enter into transactions with each other. Given that the corporate parties involved in these cases are likely to have sophisticated legal counsel, the protectionism that arises out of the liberal circuits is unnecessarily paternalistic. When an American corporation chooses to do business abroad, it must calculate the risks of potentially becoming involved in international litigation. Corporations can account for those risks by contracting over choice of law and choice of forum before litigation arises.<sup>212</sup> Anti-suit injunctions may be appropriate in order to enforce those contractual agreements, but beyond that, there is very little reason for liberal circuits to protect American movants as they do. U.S. courts should not be a haven for only U.S. movants to run to when something goes wrong.

### B. *A Proposed Solution*

Anti-suit injunctions are an important jurisdictional power and can be very useful in the future as long as there is some check on the tendency to favor American movants. The restrictive test may be the best framework for courts to ensure that all movants are treated equally. Under the restrictive approach, if a U.S. court's jurisdiction is truly threatened by an action abroad, then the court may issue an anti-suit injunction.<sup>213</sup> As demonstrated in Part III.B.6.c, pro-American bias is still possible in restrictive circuits. However, because the restrictive circuits "presume a threat to international

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... have their judgments enforced, and they may even find their decisions blocked by foreign legislation." *Id.*

<sup>210</sup> See PETER STONE, CIVIL JURISDICTION AND JUDGMENTS IN EUROPE 146 (1998). Stone discusses both the power and the danger of international anti-suit injunctions and advocates for only issuing anti-suit injunctions in the rarest of circumstances. Stone colorfully criticizes courts that improvidently grant anti-suit injunctions, noting that "there is little to be said for arbitrary obstruction arising from judicial chauvinism." *Id.* at 146.

<sup>211</sup> See *id.*

<sup>212</sup> Pre-litigation contractual agreements may not always be respected, however. See *Canon Latin Am., Inc. v. Lantech (CR), S.A.*, 508 F.3d 597, 602 (11th Cir. 2007), discussed *supra* Part III.B.4, where the Eleventh Circuit ignored Florida choice-of-law and forum selection clauses and denied an anti-suit injunction.

<sup>213</sup> See *Gau Shan Co. v. Bankers Trust Co.*, 956 F.2d 1349, 1355 (6th Cir. 1992).

comity whenever an injunction is sought against litigating in a foreign court,"<sup>214</sup> they are less likely to issue protectionist anti-suit injunctions.

Although the Supreme Court denied certiorari on anti-suit injunction issues three times during the 2007 term,<sup>215</sup> the longstanding circuit split and the gravity of issuing anti-suit injunctions will likely prompt the Court to eventually settle the conflict among circuits.<sup>216</sup> Because the restrictive approach appears to treat American and foreign movants evenhandedly, the Supreme Court should adopt the restrictive circuits' test for anti-suit injunctions.

When adopting the restrictive approach, the Supreme Court's opinion should caution lower courts against their tendency to favor U.S. movants.<sup>217</sup> In doing so, the Court should emphasize the importance of preserving diplomatic relations.<sup>218</sup>

To guide the lower courts, the Court should consider giving effect to portions of the Restatement of the Foreign Relations Law of the United States.<sup>219</sup> A comment to Restatement Section 403 contemplates the problem of conflicting exercises of jurisdiction and encourages international cooperation: "[E]ach state is required to evaluate both its interests in exercising jurisdiction and those of the other state. When possible, the two

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<sup>214</sup> *Allendale Mut. Ins. Co. v. Bull Data Sys.*, 10 F.3d 425, 431 (7th Cir. 1993).

<sup>215</sup> See discussion, *supra* note 10.

<sup>216</sup> Teitz, *Foreign Judgments*, *supra* note 21, at 3; Vesna Jaksic, *Anti-Suit Injunctions Split Circuits*, NAT'L L.J., Aug. 6, 2007, at 9.

<sup>217</sup> For example, the Supreme Court's strong statements in *M/S Bremen v. Zapata*, 407 U.S. 1 (1972), have gone a long way toward influencing lower courts. See, e.g., *Gen. Elec. Co. v. Deutz AG*, 270 F.3d 144, 160 (3d Cir. 2001) (quoting *M/S Bremen*, 407 U.S. at 9).

<sup>218</sup> Because one of the seminal anti-suit injunction cases, *Laker Airways Ltd. v. Sabena, Belgian World Airlines*, 731 F.2d 909 (D.C. Cir. 1984), sparked a diplomatic crisis between the United States and United Kingdom, the Supreme Court can draw from the circumstances in that case to craft a convincing opinion for adopting the restrictive circuit test and discouraging favoritism of U.S. movants.

<sup>219</sup> RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 403 cmt. e (1986). This portion of the Restatement has been in place for more than twenty years, and is yet to be cited for the proposition that U.S. courts should cooperate with a foreign state when considering what to do about conflicting exercises of jurisdiction. The case citations in the Restatement indicate that Comment e of Section 403 has been previously cited, but for a separate proposition. See *Hartford Fire Ins. Co. v. California*, 509 U.S. 764, 799 (1993) (quoting Comment e's statement that there is not a conflicting exercise of jurisdiction "where a person subject to regulation by two states can comply with the laws of both"); *U.S. v. Nippon Paper Indus. Co.*, 109 F.3d 1, 11 (1st Cir. 1997) (same); *Sterling Drug Inc. v. Bayer AG*, 14 F.3d 733, 746 (2d Cir. 1994) (same); *Crompton Corp. v. Clariant Corp.*, 220 F. Supp. 2d 569, 573 (M.D. La. 2002) (same); *In re Maxwell Comm. Corp.*, 93 F.3d 1036 (2d Cir. 1996) (same); *U.S. v. Int'l Bhd. of Teamsters*, 945 F. Supp. 609, 624 (S.D.N.Y. 1996) (same).

states should consult with each other.”<sup>220</sup> The Restatement further suggests that, when considering the interests of the foreign nation, a U.S. court “may take into account indications of national interest by the foreign government, whether made through a diplomatic note, a brief amicus curiae, or a declaration by government officials in parliamentary debates, press conferences, or communiqués.”<sup>221</sup>

Thus, to encourage cooperation among the nations, the U.S. courts should seek the opinions of the other forum as to whether the forum will tolerate an anti-suit injunction operating against its jurisdiction.<sup>222</sup> There is already some precedent for this gesture of cooperation, as evident by the recent amicus brief filed by the Indonesian government supporting the Petition for Certiorari in *PT Pertamina (Persero) v. Karaha Bodas Co.*<sup>223</sup> There may be times when a court considering whether to issue an anti-suit injunction chooses to deviate from the recommendation of the foreign government. Better, however, to have asked and to give a principled reason for countering the recommendations of the foreign state than to strongarm foreign litigants into litigation solely before a U.S. court. If the U.S. court’s request for an opinion of the other forum receives no response, U.S. courts should be willing to hear evidence from either the moving or the opposing party regarding the foreign state’s stance on having an anti-suit injunction bar proceedings in its court.<sup>224</sup> The United States is not and should not operate in a vacuum, and actively encouraging the opinions of foreign states will honor the foreign courts’ dignity, allow for valuable exchange between the nations, and increase the possibility that U.S. litigants and U.S. judgments will receive reciprocal respect in foreign nations.

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<sup>220</sup> RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 403 cmt. e (1986).

<sup>221</sup> *Id.* at § 403, n.6. One author has suggested forwarding anti-suit injunction issues to the Executive branch under the act of state doctrine. Kathryn E. Vertigan, Note, *Foreign Antisuit Injunctions: Taking a Lesson from the Act of State Doctrine*, 76 GEO. WASH. L. REV. 155, 180 (2007). Although this idea is a possibility, taking the matter of anti-suit injunctions out of the hands of U.S. courts and giving the power to the Executive branch may cause separation of powers concerns.

<sup>222</sup> See RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 403 cmt. e (1986).

<sup>223</sup> See Brief for the Republic of Indonesia as Amicus Curiae in Support of Petitioner, *PT Pertamina (Persero) v. Karaha Bodas Co.*, 128 S. Ct. 2598 (2008) (No. 07-619).

<sup>224</sup> RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 403, n.6 (1986).



## V. CONCLUSION

If the United States hopes to thrive in an integrated, globalized economy, giving due respect to foreign jurisdictions and careful consideration to foreign litigants is essential. Anti-suit injunctions wield tremendous power over litigants and significantly affect the jurisdiction of a foreign court.<sup>225</sup> Comparison of both the liberal and restrictive circuits suggests that the construction and application of the liberal circuit test may be more likely to yield results that favor American movants.<sup>226</sup> Although the pool of cases is small and there may be other factors that affect whether a court grants an anti-suit injunction, isolating the factor of party nationality and viewing the cases in the aggregate suggests that there is some correlation between party nationality and the likelihood of receiving an anti-suit injunction in the liberal circuits.<sup>227</sup> U.S. courts should strive to appear as equitable as possible, especially when litigating in the international arena. Therefore, the restrictive test, which is less likely to favor American movants or permit implicit bias, should be adopted by the Supreme Court and applied rigorously by the lower courts. By adopting a uniform, deferential test, the United States will increase the willingness of international businesses to cooperate with American businesses, improve its diplomatic relations, and demonstrate its commitment to international cooperation.

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<sup>225</sup> See discussion *supra* Part I.

<sup>226</sup> See discussion *supra* Parts III.A.5, III.B.7.

<sup>227</sup> See discussion *supra* Part III.C.

